

January 1981

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ORAL ARGUMENT IN THE NINTH CIRCUIT: THE VIEW FROM BENCH AND BAR*

Stephen L. Wasby**

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* Financial assistance for the research reported here came from the Office of Research and Projects, Southern Illinois University at Carbondale, and from the Penrose Fund of the American Philosophical Society. Office space during the author's stay in San Francisco was graciously provided by Hastings College of Law through Dean Marvin Anderson. The author wishes particularly to thank Dorothy Robyn, Graduate School of Public Policy, University of California, Berkeley, and Professor Thomas Kerr, Hastings College of Law, for assistance in developing the questionnaire. The author's deepest appreciation is extended to the judges of the U.S. Court of Appeals for the Ninth Circuit and the lawyers in San Francisco and Los Angeles who took the time to be interviewed or to answer questionnaires.

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I. INTRODUCTION

Oral argument has traditionally been an important part of the process by which appellate cases are decided. Oral argument, the core of the English appellate tradition,¹ long antedated written briefs in the United States, and continued without time limitations even after the appearance of written argument (briefs), which were not at first required. The Supreme Court moved from substitutability of written and oral argument, indicated in the Court's waiver of oral argument if written arguments had been submitted, to mandatory written argument submitted before oral argument. By the end of the last century, when "our present mandatory adversary briefing practice had become fully developed,"² oral argument was reserved for the more important cases.³

Caseload pressures have led to limitations on the time granted to each side for its oral presentation and some courts have dispensed with oral argument completely in some cases. This controversial development drew the attention of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission or the Commission). While it would be "clearly unwarranted" to "mandate oral argument in every case," concluded the Commission, "oral argument is an essential part of the appellate process." The Commission also warned against ignoring "the risks to the process of appellate adjudication" if oral argument were too readily denied.⁴

The controversy has not abated since the Commission pub-

1. P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *JUSTICE ON APPEAL* 16 (1976) ("In England still today, the written submission is not the norm and appellate argumentation is entirely oral.").

2. FEDERAL JUDICIAL CENTER, *COMPARATIVE REPORT ON INTERNAL OPERATING PROCEDURES OF UNITED STATES COURTS OF APPEALS* 4 (1973).

3. See generally Wasby, D'Amato & Metrailler, *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q. J. Speech 410-42, particularly at 412 (Dec. 1976) [hereinafter cited as Wasby, et al.].

4. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, *STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE* 106, 107 (1975) [hereinafter cited as *STRUCTURE AND INTERNAL PROCEDURES*].

lished its comments. Recent attention to the problem of lawyer advocacy competence; however, has been focused primarily on the trial courts by Chief Justice Burger, who in his 1973 Sonnett Lecture stated “as a working hypothesis [that] from one third to one half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation,”⁵ and by the Committee to Consider Standards for Admission to Practice in the Federal Courts of the Judicial Conference of the United States (the Devitt Committee). While a “substantially divided” committee, saying “[t]he problems presented were not sufficiently serious to call for the recommending of remedies,”⁶ made no recommendations on appellate advocacy, the Committee’s existence, hearings, and report helped to focus attention on oral argument at the appellate as well as trial level. Moreover, the Federal Judicial Center’s report of judges’ and attorneys’ evaluations of lawyers competence contained considerable information on participants’ views about appellate advocacy,⁷ as did earlier Federal Judicial Center surveys of both lawyers and judges.⁸ The subject, whether or not one sees it as a “problem,” and whether or not one sees it as more or less significant than trial advocacy, is nonetheless of considerable importance. Thus, the views of appellate judges and lawyers about oral argument should be of value.

The importance of appellate oral argument has often been stated. Justice Brennan, responding to proposals for reducing or eliminating oral argument, said there had been “too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself

5. *Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists*, 60 A.B.A.J. 171, 173-74 (1974). See also Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974); Maddi, *Trial Advocacy Competence: The Judicial Perspective*, 1978 Am. B. Foundation Research J. 105; Maddi, *Judges’ Views of Lawyers in Their Courts*, 1979 Am. B. Foundation Research J. 689.

6. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS, REPORT AND TENTATIVE RECOMMENDATIONS 30-31 (1978). The final report was issued in 1979.

7. A. PARTRIDGE & G. BERMANT, *THE QUALITY OF ADVOCACY IN THE FEDERAL COURTS* (1978).

8. J. GOLDMAN, *ATTITUDES OF UNITED STATES JUDGES TOWARD LIMITATION OF ORAL ARGUMENT AND OPINION-WRITING IN THE UNITED STATES COURTS OF APPEALS* (1975); T. DRURY, L. GOODMAN & W. STEVENSON, *ATTORNEY ATTITUDES TOWARD LIMITATION OF ORAL ARGUMENT AND WRITTEN OPINION IN THREE U.S. COURTS OF APPEALS* (1974) [hereinafter cited as DRURY, ET AL.].

were I to be denied" it. And Justice Harlan found "no substitute" for this "Socratic method of procedure in getting at the heart of an issue and in finding out where the truth lies."⁹ Yet the considerable importance of oral argument in the U.S. Supreme Court does not necessarily mean it is equally important in other appellate courts, some of which may value argument highly while others "simply tolerate oral argument as quietly as possible."¹⁰ Indeed, Judge Hufstedler has suggested that oral argument serves different purposes in "courts of last resort exercising discretionary review," whose function is "to establish overarching precedents and policy for every level of the judicial system below their lofty perches," where there is more play for counsel's "legal and social philosophies," and intermediate appellate courts, where "arguments . . . are most effective when the advocate can persuade the courts that existing precedent controls, or if it does not, that it need be nudged only a little to reach his conclusion."¹¹

A distinct tension emerges from recent consideration of appellate oral argument. The tension is between retaining a practice thought by judges and lawyers to be essential, and curtailing it in certain classes of cases to allow its retention in others where it is thought to be most useful. The tension was nicely captured in a pair of recent articles. Dean Paul Carrington argued against abandoning "procedural amenities," including oral argument, which allowed courts to "be seen to be obeying and enforcing the law,"¹² while Fifth Circuit Judge John Godbold, stressing "identifiable differences between appellate cases," suggested that such differences could "be used as a basis for selectively different treatment of cases."¹³ Indeed, as Judge Godbold pointed out,

9. STRUCTURE AND INTERNAL PROCEDURES, *supra* note 4, at 104. See also *Pennsylvania v. Mimms*, 434 U.S. 106, 123 n.13 (1977) (Stevens, J., dissenting) for a typical statement made when the Supreme Court decides a case without argument: "I do not foreclose the possibility that full argument would convince me that the Court's analysis of the merits is correct. My limited experience has convinced me that one's initial impression of a novel issue is frequently different from his final evaluation."

10. Hufstedler, *The Art of Oral Argument*, 18 LAW QUADRANGLE NOTES 15 (Spring, 1974).

11. *Id.* at 14.

12. Carrington, *Ceremony and Realism: Demise of Appellate Procedure*, 66 A.B.A.J. 860 (1980).

13. Godbold, *Improvements in Appellate Procedure: Better Use of Available Facilities*, 66 A.B.A.J. 863 (1980). See also the Hruska Commission testimony of Ninth Circuit Judge Ben C. Duniway:

Federal Rule of Appellate Procedure 34(a), which requires unanimity in a three-judge panel before oral argument can be dispensed with in a case, provides for appellate oral argument "unless (1) the appeal is frivolous; or (2) the dispositive issue or set of issues has been recently authoritatively decided; or (3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."¹⁴

The present Article is a detailed presentation of the views of judges and lawyers in one federal appellate court about various aspects of oral argument. It is part of a larger study of the U.S. Court of Appeals for the Ninth Circuit,¹⁵ based on interviews conducted with fifteen of the court's then eighteen active-duty and senior circuit judges and a dozen district judges, all with extensive experience on the appellate court.¹⁶ To provide at least

As a result of the last few years' experience, I am inclined to think now that . . . what the judges focus on in deciding whether to screen really is the question, "Is oral argument going to be helpful? Is it that kind of question?"

This is a legitimate way of cutting down on the workload. We get some very good oral arguments before this court and we get a whole lot of oral arguments that are perfunctory and almost pro forma, and that don't help us a bit. The problem is: How do you know which you are going to get?

COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, FIRST PHASE: HEARINGS 902 (1973) [hereinafter cited as FIRST PHASE]. In the considerable literature on appellate oral argument, a useful summary of basic positions is presented in Segal, *Oral Argument in the U.S. Court of Appeals: Can It Be Salvaged?*, 2 LITIGATION 3 (Fall 1975); Wright, *Oral Argument and the Appellate Process*, 2 LITIGATION 5 (Fall 1975).

14. FED. R. APP. P. 34(a) (effective Aug. 1, 1979).

15. See Wasby, "Extra" Judges in a Federal Appellate Court: *The Ninth Circuit*, 15 L. & Soc'y REV. (No. 1, 1980-1981, forthcoming); Wasby, *Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution*, 32 VAND. L. REV. 1343 (1979); Wasby, *Communication Within the Ninth Circuit Court of Appeals: The View from the Bench*, 8 GOLDEN GATE U.L. REV. 1 (1977); Wasby, *Extra Judges in "The Court Nobody Knows": Some Aspects of Decision-Making in the United States Courts of Appeals* (paper presented to the American Political Science Association) (Washington, D.C. 1979).

16. The interviews took place in the spring of 1977. All but one of the eleven active-duty circuit judges (there were two vacancies at the time) and five of the seven senior circuit judges were interviewed. The court now has twenty-three judgeships, as a result of additional positions created under the Omnibus Judgeship Act of 1978, 28 U.S.C. § 44 (Supp. III 1979), in addition to its senior judges. The district judges were primarily from California and Oregon. Not all judges answered all the questions, in part because questions about oral argument came at the end of the interview. The interviews were from one to two hours in duration and took place in the judges' chambers. Most interviews were conducted in San Francisco while the judges were there for oral argument, but

a limited basis for comparison with the judges' responses, information was sought from attorneys who had argued before the court and would thus have some experience on which to base their answers. Interviews were conducted with thirteen San Francisco lawyers who had argued more than one case before the Ninth Circuit in the year prior to the interviews. Responses from several Los Angeles lawyers were obtained from a mail questionnaire, resulting in information from nineteen lawyers.¹⁷

After a look at respondents' backgrounds and the lawyers' specific views of oral argument in the Ninth Circuit, we turn to respondents' views as to whether argument is more important for the judges or for the lawyers or equally important for both. Next is an intensive analysis of the ways in which oral argument helps the judges and the attorneys, with attention to each of the functions oral argument is said to perform. This will be followed by respondents' views as to whether argument is significant or determinative in the cases presented to the court, the types of cases in which oral argument is most helpful and least helpful, and the ways in which oral argument does *not* help. The Article concludes with a brief examination of judges' preparation for oral argument.

A. RESPONDENTS' BACKGROUND

Respondents' experience in arguing appellate cases varied considerably. All the circuit judges, and five of seven district judges responding, had argued cases in the appellate courts. Only three circuit judges, one of whom had argued between forty and fifty state appellate cases and another roughly one hundred cases, and two district judges could be said to have done so extensively. Only three other judges (two circuit judges and a district judge) had argued even a dozen cases in the state appellate courts. Only one circuit judge had argued more than a few cases before the U.S. Court of Appeals—and that in the Ninth Circuit itself.

The lawyers' appellate experience also varied considerably.

others were conducted at the judges' resident "duty stations."

17. All thirteen San Francisco lawyers from whom interviews were sought were interviewed. Eighteen questionnaires sent to Los Angeles attorneys produced only six responses; this response rate (33%) is roughly that expected for mail questionnaires, but further mail surveying was discontinued because of the low number of returns.

Because not many lawyers argue regularly in the federal appellate courts, the lawyers were disproportionately experienced. Five of the nineteen lawyers had been in practice for less than ten years; eight, between ten and nineteen years; and six, more than twenty years. Three of the latter had more than thirty years legal experience. Two of the lawyers had each argued over two hundred cases before state or federal appellate courts, two had argued over one hundred appellate cases, and two others had argued between fifty and one hundred cases. The seven lawyers least experienced in such matters had argued fewer than twenty appellate cases. Four lawyers had argued between twenty and thirty cases and two others, between thirty and fifty. The attorneys' experience before the Ninth Circuit was generally limited. Six had argued fewer than ten cases there, five had argued between ten and twenty, and four had argued between twenty-five and fifty. Only two had argued more than fifty, with the most experienced federal appellate advocate claiming 190 Ninth Circuit cases.

B. CHANGES IN VIEWS

The circuit judges were evenly divided as to whether their views of oral argument were different from what they had been when they were practicing lawyers. Seven said their views had changed and seven said they had not. Seven of ten district judges had changed their views. Three circuit judges, whose views had not changed, believed that oral argument is important. One had been "idealistic" about it and had never changed his view. However, another judge had not changed his opinion because, as a lawyer, he had limited his view of oral argument's importance. He had "mostly" waived argument on appeal, particularly if he won below and had a "strong brief," not doing so only if he realized he "had the weaker side and hoped to change the law." On the other hand, a circuit judge who reported changed views would "never waive" argument. If a case was worthy of appeal, it was "worthy of my presentation in my way." Also indicating his earlier sense of self-importance, a colleague said he believed he was "the hottest appellate lawyer" around.

A couple of the district judges had believed, as attorneys, that they could help the judges. One, who was "disappointed if the court wouldn't hear me," "thought there was something I could add." Another believed he was there to use his knowledge

"to guide the judges." He now believes that oral argument is "not that essential," particularly in a "strong minority" of cases sufficiently lacking in merit that "if John Davis argued, it wouldn't make a difference." A senior circuit judge who had "wavered back and forth" on the importance of oral argument had believed that as a lawyer he "had a constitutional right to a published opinion and oral argument in every case." As a judge, he believed that with the court's caseload, the court "can't give the time" for oral argument in every case because it is "important to get the case decided." He would not do away with oral argument, however, "if doing so will destroy confidence"—the public would first have to be educated. In his comments, he has expressed the tension between traditional practice and the need to dispose of cases. So, too, did a district judge, who said he believed there was "too much emphasis on speedy disposition of cases at the expense of quality." As a district judge, he had regularly used extended presentations by the lawyers, interspersed with his questions—a "controlled bull session"—to help resolve cases. Similarly, a district judge, now a member of the Ninth Circuit, believed oral argument in the court of appeals was only "minimally" helpful because of the short time allotted to each case. He was accustomed to and enjoyed too "extended" (three-to four-hour) sessions of oral argument in his own court "before bright, well-prepared lawyers." Finally, another circuit judge believed his views had changed because of differences between the courts to which one was arguing. Like most attorneys who argued appellate cases, he had appeared primarily in state appellate courts, "where only one judge had boned up" on the case, whereas in the Ninth Circuit, it's "not like that"—the judges were prepared and had "specific ideas they are interested in."

Eleven of eighteen lawyers said their views on oral argument had changed from what they were before they had argued appellate cases. One said he didn't know. Only two indicated a change of views in a positive direction. One changed his opinion when, after losing his first two or three cases and "thinking I was spooked," he read materials on oral argument and won his next case. The other, who thought in law school that the judges "knew much," now realizes that they don't, and so feels that oral argument has greater importance in informing them. (A lawyer who now thought argument less important had thought judges were "great minds making decisions." Now he "knew they are

not great minds.”)

For the attorneys whose views had changed in the direction of decreased importance of oral argument, some change came simply from increased experience. One attorney had anticipated more questions from the bench than he had received. Another, a “hot-shot moot court person in law school,” had “become aware that argument is not too important.” A third, who believed he had an understanding of oral argument from having clerked for the court, thought after law school that “brilliance” would have a greater impact on the judges than it does. “It doesn’t sway them in a high percentage of cases,” he said. He now simply “hopes to answer a question or explain why something is important.” (Another former clerk who had “built up confidence,” then, because he was not happy with the overall quality of lawyers, had changed his earlier “too trite” impression that a case could be lost but not won by oral argument.)¹⁸ Similarly, a colleague had not found oral argument the “highly persuasive medium for the judges” he had earlier considered it to be, while another, who had thought oral argument “was to exchange ideas on the case and to grapple with its problems,” had learned that “in some courts it’s for no reason.” It’s a “theatrical performance,” “mostly to amuse and at times irritate,” said another.

C. LAWYERS’ PROBLEMS WITH NINTH CIRCUIT ARGUMENT

Ten of nineteen of the attorneys had found no particular problems in arguing cases before the Ninth Circuit. Several indicated that there were no problems because they were quite familiar with the court. Some problems turned on the “personalities and predilections of the judges.”¹⁹ Indeed, all but two of the lawyers agreed that some judges are easier to argue to than are others. “As with all human beings, some are easier to have rapport with.” Other comments related to the judges’ ideologies or “sympathies.” One lawyer, for example, found most of the

18. This “too trite” position is precisely the one taken by former Assistant Solicitor General Philip Elman. R. KLUGER, *SIMPLE JUSTICE* 551 (1976) (“Overall, . . . it is safe to say that you may well lose your case with a bad oral argument but it is difficult to win it by a strong one.”).

19. Material which appears in quotation marks without attribution is drawn from the author’s interviews, conducted under conditions of confidentiality and anonymity, with the understanding that quotations would not be attributed to particular individuals and that no one but the interviewer (the author) would see the interview transcripts.

judges "far removed in experience and social strata" from the people he represented, making his biggest problem the judges' "conservative mentality."

The court's unwillingness to let lawyers know who was assigned to hear their cases until the day of argument drew fire from two attorneys who talked of the court's "penchant for secrecy." One wished to know the panel membership to get some idea of how the judges liked to have material presented, for example, whether they were interested in technical material. The other complained that once he found out who the judges were, he had to rush to the court library to see what the judges had written on the subject of his case. Asked whether lawyers would engage in "panel-shopping" (by feigning illness, for example) if they knew the panel composition in advance, he said he didn't believe that "lawyers would certify heart attacks." Indeed, he argued that the court should experiment by letting lawyers know in advance what the panel membership was and then seeing whether it did produce panel-shopping, which he believed did not happen in the California Courts of Appeal. (As a corrective measure against feigned illness, he suggested that if the lawyer couldn't appear, the judges could accept a brief.)

As the above comments probably suggest, the lawyers generally found it helpful to know something about the judges before arguing to them. Fifteen of the nineteen lawyers found it helpful to have observed the judges at oral argument in other cases before they made their own argument. One of the four who said "it doesn't help me" indicated accurately that his was the "minority view." One lawyer specifically had used motions in a case to find out who the panel members were. This information helped in "knowing how to present my argument." While it was particularly important to "get an idea about their questioning," another lawyer, who found watching them at argument helped "a little bit" in allowing him "to gauge their temperament," found that less crucial than knowing "who they were"—their decisions, their background, who appointed them, and their "professional orientation."

On the whole, the lawyers were satisfied with oral argument itself in the Ninth Circuit. One attorney, whose ability had been mentioned by several judges, found the court "by and large, an

agreeable court to argue to,” “prepared,” and “open,” with the judges asking “intelligent questions”—although they had not done so in the past. Indeed, he believed the Ninth Circuit to be better than the United States Supreme Court, although he conceded that his extensive experience “may get [me] treatment different from a ‘young kid.’” Another lawyer, however, did *not* find Ninth Circuit argument as stimulating or exciting as Supreme Court argument. In fact, he believed that the Ninth Circuit “would benefit from following the Supreme Court’s pattern,” by which he meant that one doesn’t “get to make speeches there,” something which could occur in the Ninth Circuit before panels which did not ask very many questions. One lawyer criticized some judges (“strange characters”) because they didn’t participate and “don’t seem involved.” Other lawyers thought the “uninterested judge” was “no great problem” in the Ninth Circuit and that the court was “uniquely prepared,” although some panels were reputed to be “asleep.”

Indeed, most lawyers thought that there was adequate questioning from the judges. Several clearly expressed a preference for judges who asked more questions. They believed it was easier to argue to judges who were better prepared and asked more questions. It was “easier to argue to a judge who will interrupt and ask questions” than to a “passive judge,” one who “just smiles or who goes to sleep.” Indeed, one lawyer became “worried” if there was no reaction from the judges. The preference for “questioning” judges was also clear in the response of the lawyer who said it was “extremely difficult to argue to a judge who stares at you or over your head.” One experienced lawyer wanted a judge who had read the briefs and knew the field of law involved in a case so he didn’t have to “draw pictures,” but could start “a dialogue based on common knowledge.” Indeed, he didn’t mind a judge “disposed against him” but objected to a judge “sitting as a lump” or one “who is not as smart as he thinks he is.” It was “less difficult to argue to judges who have done their homework” and “easy to argue to responsive, intelligent, interested judges who have done their work,” but difficult when the judges were “irascible, indifferent, or openly hostile.” The lawyers were concerned not only with the frequency of questions, but with the quality of questions as well. Several preferred “tough” or “perceptive” questions. One judge was specifically mentioned as the “best to argue before” because of the fre-

quency of the judge's questions. Another lawyer, however, who preferred "interrogators" to those who "don't say anything," had been "intimidated" and "got nervous" after watching the same judge in another case.

Despite their preference for questioning, some lawyers indicated the problem of not having enough time to argue their cases, particularly if there had been a "complicated long trial." This conflict between answering questions and making points one wishes to make is shared by lawyers in other courts. Several of the attorneys interviewed by Marvell "said they liked questions; yet they complained that the questions cut into their allotted time so much that they had to abandon some of the points they had wished to emphasize."²⁰ There were also negative reactions to judges who make extraneous comments during argument. Attorneys remarked about some "particularly cantankerous" judges who had complained about salary and budget problems during arguments, and of "one judge [who] rambled on for most of the time with war stories on points not at hand," and who did not give the attorney an opportunity to answer questions or to explain his position. One lawyer, who preferred judges who are "right with you" and are "willing to go into intellectual exercise," learned to "ignore" this particular judge. Another lawyer, who didn't "get anywhere" with him, "particularly with difficult cases with much to analyze," believed he needed "to reduce the case to a basic formula" the judge could grasp. He also mentioned a judge from years past who was "death on lawyers because of his own feelings of inadequacy," which led him to "talk too much."

II. HOW ORAL ARGUMENT HELPS

A. IS ORAL ARGUMENT HELPFUL?

According to Marvell, "A great many appellate judges, . . . strongly believe that the arguments are a major help."²¹ The chief circuit judges, responding to inquiries from Eighth Circuit Judge Myron H. Bright, generally found oral argument helpful. It was helpful, "sometimes when least expected," remarked First

20. T. MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* 79 (1978).

21. *Id.* at 75.

Circuit Chief Judge Frank Coffin.²² Some thought oral argument “valuable only in some cases,” because, as stated by Third Circuit Chief Judge Collins Seitz, there were “a great many wherein the lawyer is just going through the motions.”²³ Because his court screened so many cases for “no oral argument,” Fourth Circuit Chief Judge Clement Haynsworth found oral argument “of some help in the majority of cases we hear.” The remaining cases were ones “with respect to which oral responses of counsel can be helpful” to one or more of the judges. In a minority of cases, Judge Haynsworth found that oral argument could give a perspective different from that obtained from the briefs.²⁴ Judge Malcolm Wilkey, speaking for the District of Columbia Circuit, distinguished between estimates of argument’s usefulness made in advance and retrospective evaluations. In one-fourth of the cases, he could say in advance that it would be helpful, although after argument he personally found it useful in half the cases or less. Judge Wilkey noted specifically that criminal cases constituted the only general category in which oral argument was not helpful and added nothing to the briefs “[u]nless there is a really difficult point involved on which our jurisprudence or the Supreme Court says that issue is rather unclear,” because “[m]ost of the issues have long been thought over and the answer on the given state of facts under the accepted law is fairly clear from the briefs.”²⁵

The late Judge Frederick Hamley of the Ninth Circuit said, “[T]he great majority of appellate judges take the view that oral argument is helpful to them in deciding the case.”²⁶ In the 1977 interviews, both circuit and district judges and the lawyers questioned were in almost unanimous agreement that appellate oral argument was helpful. Even the one district judge who first said it was not, later said it was helpful in roughly twenty percent of the cases he heard on the appellate bench, and the one lawyer—an assistant U.S. attorney—who found it not helpful said it was the most enjoyable phase of the appellate process for him.

22. Bright, *The Changing Nature of the Federal Appeals Process in the 1970's, A Challenge to the Bar*, 65 F.R.D. 496, 505 n.8 (1975).

23. *Id.*

24. *Id.*

25. *Id.*

26. FIRST PHASE, *supra* note 13, at 777.

Relative Importance

There is an interesting difference between judges' and lawyers' opinions whether oral argument is more important for lawyers, more important for judges, or equally important for both. Although district judges were about equally divided among the three responses, roughly half the circuit judges believed oral argument equally important for both groups, with the remainder divided over whether it is more important for judges or for lawyers. No lawyers, however, believed that oral argument is more important for lawyers; two-thirds said it is equally important for both judges and lawyers, and the remaining one-third thought it more important for the judges. (One senior district judge and two lawyers thought oral argument equally *unimportant* for both lawyers and judges.)

Representative of the view that oral argument is more important for the judges were statements that "if it is not helpful to the judge, it is not helpful to the ultimate outcome" of the case and that "the court has to be the sole beneficiary or [oral argument] is not worthwhile." "At the appellate stage," observed another circuit judge, "the case is no longer the lawyer's but the court's." Oral argument may give the lawyers insights but by then it was too late to be of much help to them, asserted another.

The lawyers agreed. Oral argument made no difference to the lawyers—who "like to listen to themselves talk"—"except to impress their clients." Those who thought oral argument equally important to both judges and lawyers tended to emphasize the complementarity of their interests. If it was important to the judge, then it was important to the lawyer, or, as one attorney observed, "Lawyers want the judges to understand; the judges want to understand."

Functions Emphasized

If there is general agreement that oral argument does help, how does it do so? A retired state supreme court justice has said that

the functions of oral arguments before appellate courts are as follows (and probably in this order):

1. To persuade judges

2. To focus on one important matter only
3. To reiterate most major points in the brief
4. To clarify facts
5. To counter opposition's arguments
6. To appeal to "justice," "right" and "fairness"
7. To legitimate the legal process by a public confrontation of issues
8. To urge judges to read (or reread) briefs
9. To prepare judges for conference deliberations
10. To force judges to communicate with each other.²⁷

Judges and attorneys differed in the emphasis they placed on the ways in which oral argument was helpful. The judges found oral argument's principal function for them *clarification* of matters and the *focus* it allows on important issues. Following close behind was the opportunity oral argument provides to *communicate* with lawyers and to *ask questions*. They also suggested, although less frequently, that oral argument provides *information* and aids in *disposing of cases*. Mentioned least frequently was argument's helpfulness in *increasing the court's visibility*. The attorneys did not place predominant emphasis on any one function of argument in assisting the judges, although clarification and the opportunity for judge-lawyer communication received greater mention than other functions. Receiving far less attention from the attorneys were providing information, giving judges the opportunity to ask questions, assisting in the disposition of cases, and an item not specifically noted by the judges, helping to save judges' time.

In their more sparse observations on oral argument's functions for lawyers, judges and lawyers also differed in their emphasis. Judges most frequently mentioned assisting lawyers to clarify matters, *persuading* the judges, and generally, in communicating with them. Least frequently mentioned was providing information to the judges, answering judges' questions, and making the lawyer's case more visible. Lawyers also spoke about *persuading* the judges and, more, about *prodding* them. In discussing how oral argument helps them, they most frequently

27. Frank P. Weaver, *quoted in* C. SHELDON & F. WEAVER, *POLITICIANS, JUDGES, AND THE PEOPLE: A STUDY IN CITIZENS' PARTICIPATION* 86 (1980).

mentioned the clarification of issues. Learning about the judges, something the judges did not mention, was of moderate importance to the lawyers, who also noted with some frequency that oral argument serves to provide information to the judges and in general to allow the lawyers to communicate with them. The opportunity to answer questions and to assist in facilitating disposition of cases were least frequently mentioned.

B. ASSISTING THE JUDGES

In discussing oral argument's functions as viewed from the Ninth Circuit, we draw primarily on judges' comments about why oral argument is helpful to them and on lawyers' responses as to why lawyers find argument helpful.²⁸ For each function of argument, we examine comments from the literature on appellate argument and particularly from Hruska Commission testimony as well as Ninth Circuit judges' and attorneys' remarks.

"P.R."

Although mentioned by only a couple of Ninth Circuit judges and no lawyer, there is a "public relations" reason for maintaining oral argument—so that lawyers and their clients will feel that their cases have been heard. Lawyers need the satisfaction of knowing they have presented their case well, said one judge. Through oral argument, added a district judge, attorneys believed they are serving their clients better and feel secure that judges are aware of their argument.

The Federal Judicial Center study of lawyer attitudes in the Second, Fifth, and Sixth Circuits showed that slightly over half the lawyers in each circuit agreed that "when a litigant is denied the right to have his lawyer argue his appeal, the litigant will feel that he has not had his day in court."²⁹ Submission of briefs

28. Although judges were asked how oral argument was helpful to them, they provided some comments about oral argument's usefulness for attorneys. Attorneys, asked about how they found it helpful—without the qualifier "for you"—responded primarily in terms of argument's helpfulness for them, with only a few responses indicating helpfulness for judges. Because of the proportion of attorneys finding oral argument more important for judges, see p. 34 *supra*, one might have expected specific comments about how this was so. Perhaps the lawyers simply found reasons why oral argument was helpful to judges to be the complement of reasons why it was helpful to them.

29. DRURY, ET AL., *supra* note 8, at 38 (Table 26). See MARVELL, *supra* note 20, at 307 n.13.

is not sufficient to assure lawyers and litigants that the judges have heard the case; one could never be sure they were read.³⁰ Without oral argument, a representative of the Idaho bar told the Hruska Commission, losing litigants would not “walk away from their case feeling it has been fully and fairly considered.”³¹ As an observer of the First Circuit commented, “[B]y demonstrating its openness and the balanced presentation of all material issues in an individual case, the court assures the public that each action is being given their personal and undivided attention in order to reach a reasoned resolution.”³² Absence of oral argument would also deprive lawyers of the knowledge that after argument, “the deciding members of the court, the three judges who have that case, who have heard the argument, are going to sit down in the room somewhere and eyeball one another, and look at each other, and talk about their client’s case.”³³ Indeed, Judge J. Skelly Wright of the Court of Appeals for the District of Columbia said, “Psychologically, as far as the litigants and the lawyers to some extent, being heard is most important. To know three judges focused on your case in your very presence is very important.”³⁴ The Hruska Commission itself echoed this testimony in its final report, pointing out that oral argument “assures the litigant that his case has been given consideration by those charged with deciding it.”³⁵ As Marvell noted, the “public relations function” of having counsel and judges in the contact at argument “is especially important when attorneys suspect that not all judges read the briefs or that the court’s staff plays a major role in the decision process.”³⁶

The other side of this “P.R.” coin is that oral argument helps to legitimate the court’s judicial function.³⁷ A representative of the American College of Trial Lawyers, appearing before the Hruska Commission, argued that “the appearance of justice to [the] litigant has been substantially lowered” when a lawyer

30. See Wasby, et al., *supra* note 3, at 418.

31. FIRST PHASE, *supra* note 13, at 769 (testimony of Eugene C. Thomas).

32. Corey, *Some Aspects of Oral Argument in the United States Court of Appeals for the First Circuit*, 21 B.B.J. 21, 32 (1977).

33. FIRST PHASE, *supra* note 13, at 322 (testimony of Samuel C. Gainsburgh).

34. *Id.* at 105-06.

35. STRUCTURE AND INTERNAL PROCEDURES, *supra* note 4, at 106.

36. MARVELL, *supra* note 20, at 307 n.13.

37. See Wasby, et al., *supra* note 3, at 418.

could not argue a case.³⁸ Another witness believed that "confidence in the judicial system" would be lost without oral argument. The Commission itself stated that oral argument "contributes to judicial accountability." It was not sufficient that a court be correct, a court also had to satisfy the litigant's desire to be heard.³⁹ This helps explain why, for a senior Ninth Circuit judge, "the visibility of the court is all-important."

Communication

Oral argument is valued because it is the only face-to-face communication in a case between attorneys and appellate judges. "It promotes understanding in ways that cannot be matched by written communication."⁴⁰ A survey of federal appellate judges indicated that oral arguments bring the case alive for both litigants and attorneys.⁴¹ Judges "can get a better 'feel' for the case, or they can more easily grasp the justice or policy issues involved." Moreover, judges at times "benefit from the personal contact with counsel: They learn more from listening than reading; the arguments are a pleasant relief from the long hours of reading and research; or human contact gets some points across better than the 'cold' briefs can."⁴² As one Ninth Circuit judge put it, oral argument "establishes a human connection between bench and bar."⁴³ According to one lawyer, argument "helps the judges to know who the attorneys are." Similarly, oral argument gives lawyers "a notion of the orientation of the court" and "helps an attorney to know where the judges are," and the way they are thinking.

The crucial nature of oral argument in terms of judge-attorney communication has often been stressed. As the late Judge William Hastie of the Third Circuit once stated, "[T]he oral argument is the court's one chance to invite counsel to meet head

38. FIRST PHASE, *supra* note 13, at 66 (testimony of Orison S. Marden).

39. STRUCTURE AND INTERNAL PROCEDURES, *supra* note 4, at 106.

40. *Id.*

41. SUTCLIFFE, *Addendum* to J. GOLDMAN, ATTITUDES OF UNITED STATES JUDGES TOWARD LIMITATION OF ORAL ARGUMENT AND OPINION-WRITING IN THE UNITED STATES COURTS OF APPEALS 2 (1975).

42. MARVELL, *supra* note 20, at 307 n.13.

43. One way of doing this is to "make statements or ask rhetorical questions to amuse the audience," but one might wonder whether asking questions "for [the judges'] own amusement" serves the function. Both were noted in a personal communication to the author from a Ninth Circuit judge.

on what seemed to be the strongest opposing contentions.”⁴⁴ There was extremely high agreement (roughly ninety percent) among Second, Fifth, and Sixth Circuit lawyers that “oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case.”⁴⁵ The judges can also use oral argument to steer lawyers further than the lawyers themselves have been willing to go. Supreme Court Justices may “state the argument they would like a petitioner to make when counsel, acting cautiously and conventionally, have proffered more limited arguments” and “can subtly steer counsel beyond the frontiers of traditional doctrine . . . by implication and by the substantive content of their questions.”⁴⁶

◦ In addition, oral argument helps bring about *collective* considerations of a case. Sixth Circuit Judge George Edwards found oral argument “particularly valuable in arriving at a ‘court’ decision rather than a one-judge decision or separate decisions by three judges arrived at individually,”⁴⁷ and federal judges surveyed by the Federal Judicial Center believed that oral argument “enables the collective consideration of issues.”⁴⁸ As Marvell noted, judges find argument important because “just afterward judges on most courts hold a conference and give their tentative views. Presumably [*sic*], the views are strongly influenced by arguments fresh on their minds”⁴⁹

Ninth Circuit judges are helped by the process and “mechanics” of conducting oral argument, particularly in “close cases.” Because “different individuals have different levels of perception through eye and ear,” having argument through both briefs and oral argument “enhances communication” because oral argument comes after reading. Thus, one hears counsel “against the generalized background of the case.” The process also forces judges “to think on the bench.” The “mechanics of

44. Quoted in *FIRST PHASE*, *supra* note 13, at 67 (quoting Maris, *In the Matter of Oral Argument*, 1 *PRAC. LAW.* 12 (1955)).

45. *DRURY*, *supra* note 8, at 38 (Table 26).

46. Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 *VA. L. REV.* 1187, 1209, 1210 (1975).

47. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, 2 *HEARINGS: SECOND PHASE* 1213 (1974-1975) [hereinafter cited as 2 *SECOND PHASE*].

48. Sutcliffe, *supra* note 41, at 2.

49. MARVELL, *supra* note 20, at 76.

doing it," not that "attorneys are overpersuasive," may make oral argument a "determining factor." "Colloquy with counsel," which, as one attorney put it, allows judges "to hear spontaneous reasoning," forces judges to change their views as they learn during the process. Certainly, for some Ninth Circuit judges, oral argument is more effective than written communication. In a complicated case, it is "better than writing letters," and is helpful when a lawyer is "a better talker than a writer" or "when men can't write." (Oral argument, one should also note, provides judges an opportunity to tell an incompetent lawyer that he has done a miserable job, without having to reduce it to writing.)

Oral argument allows not only communication between judges and lawyers, but among the judges as well. Thus questions which are in form directed to counsel may be intended for a judicial colleague, to sway that colleague toward a particular position or at least to alert him to the need to face certain issues.⁵⁰ In the Ninth Circuit, both the judges and lawyers are aware of the importance of communication among the judges at oral argument. One of the lawyers said that judges "may use the attorney's mouth to convince his colleagues." Oral arguments give judges an "opportunity to respond to each other's questions." Argument can be used to communicate the "key points of a case" to colleagues as well as to attorneys. Thus, at the end of argument, the judges "will have an excellent idea what the key points of a case are" and what the "soft underbelly" of the problem is, as well as a sense of the other judge's views. Closely related is that concessions may be more important to other members of the panel when they come from a lawyer than if the judge seeking and obtaining the concession made the same argument directly to colleagues in conference.

Questions

Questions are, of course, central to communication in oral argument, although, as Marvell suggested, judges "rarely explain in detail" how questioning helps them.⁵¹ As Judge Maris stated

50. See Wasby, et al., *supra* note 3, at 418; Wasby, *Communication Within the Ninth Circuit Court of Appeals*, *supra* note 15, at 5.

51. MARVELL, *supra* note 20, at 76. Marvell also noted that "half the judges added that they or their colleagues sometimes asked questions for purposes other than to get help from these attorneys, but these questions are said to be uncommon and usually improper," e.g., to belittle the attorneys. *Id.* at 77.

some years ago, oral argument's "prime value . . . is to afford an opportunity for the judges to pose to and secure from counsel answers to the questions which have arisen in our minds after the preliminary consideration which we have given to the briefs."⁵² Ninety percent of the lawyers surveyed by the Federal Judicial Center agreed that "by asking questions of counsel, the judges are better able to avoid erroneous interpretations of the facts or issues in the case."⁵³

Only a couple of Ninth Circuit attorneys referred to questioning at oral argument. One did pungently point out that a single question "will let the wind out of the gasbag" if a lawyer's arguments were not firm. The Ninth Circuit judges stressed the *opportunity* oral argument provided to ask questions about matters on their mind, doubts about the record, and "items not entirely clear." "Sometimes we can't understand until we ask questions." Lawyers may give a point different emphasis in response to a question from the emphasis in the briefs, allowing the judge to "determine the attorney's real position." Indeed, several judges saw questioning as a way of testing lawyers. When a judge has tentative views, you can "test counsel's reactions to those views." When a judge asked questions about how he could decide the case the attorney's way, the lawyer was supposed "to tell me how I can decide the case his way easily." If the lawyer were not ready with answers, it would make clear it couldn't be done. Likewise, if the judges were confused about a complex case, oral argument allowed him to "search for reinforcement" so he "could be sure he was not going off the deep end."

Information

Through questioning, judges obtain information and clarify the elements in a case. Oral argument brings to judges' attention matters not evident in the briefs or not previously available.⁵⁴ Sometimes Ninth Circuit judges "stumble on things accidentally" at oral argument or "something may be there the judges haven't considered." This may be a "factual or procedural mat-

52. Maris, J., *supra* note 44, quoted in *FIRST PHASE*, *supra* note 13, at 67.

53. DRURY, ET AL., *supra* note 8, at 38 (Table 26).

54. However, less than half the attorneys in federal appellate practice surveyed by the Federal Judicial Center considered oral argument the *only* way to inform judges effectively of facts and issues in a case. DRURY, ET AL., *supra* note 8, at 38 (Table 26).

ter," but new legal arguments also come to the court's attention when lawyers "come up with a rationale we haven't heard." A circuit judge thought it "unlikely," although possible, that a lawyer would tell about an overlooked case, but a district judge believed the court could find out about new cases at oral argument. Oral argument does allow the court to "learn where new cases would go if unleashed in this case," and, particularly important if the judges were looking beyond the disposition of the specific controversy before them, they can learn about the "practical effect" of unique cases. Although a brief usually covers more than does oral argument, argument can provide the judges with more information "when a lawyer 'lays back' and doesn't put everything in the briefs." Judges can also find out what has happened with matters left unresolved by the last brief. This is especially important when there has been a long delay between the filing of the last brief and oral argument.

Clarification

Oral argument, Eighth Circuit Judge Myron Bright has observed, "allows the judges . . . to clear up any doubts that the court might have about the case or the lawyer's approach to it."⁵⁵ Many Ninth Circuit judges thought clarification a salient function of oral argument. While several judges thought clarification would occur at oral argument where briefs were "ambiguous" or even poor, it could also occur when they were well done, for example, in extremely complex cases or those with "tricky questions requiring a good analytical approach." Oral arguments allow judges to "get a grip on the dispositive point" in a case by giving them the highlights in an orderly way. Because the attorney who has written a brief may have been "too close to the trees to see the forest," a "good fundamental point" may not have been developed, but could be explored at argument. Judges believed that oral argument may also lead a judge to go back and read more in the record or related materials, and lawyers can help clarify by providing specific references to portions of the record. Clarification may also entail correcting errors. A judge can be "straightened out" at the start of a case before he does further research, or a judge who has overlooked something or who has misread the record can be helped.

55. Bright, *supra* note 22, at 506.

Part of clarification is getting a new perspective on an issue. As a Louisiana attorney, referring to Judge Skelly Wright's practices, observed, "perhaps a nuance, a twist or misunderstanding, can be cleared up when two men learned in the law confront each other."⁵⁶ In the Ninth Circuit, several district judges thought oral argument provided a "view different from the briefs," or from a different standpoint from that given by the record, one which gives "better perspective" or "greater depth" than the briefs provide.

Oral argument "cast new light" on aspects of cases being considered. It "gives the judge a chance to clarify what the contentions are" and "allows the court to require counsel to make his position clear" through a "good, logical analysis of the briefs." Because lawyers, "taught to condense points," "leave questions hanging open" and are vague in reference to the record, oral argument allows expansion of matters "succinct in the briefs" and provides an opportunity to reduce the briefs' vagueness. According to one experienced appellate attorney, this is particularly helpful "where the judges' minds are not settled," where they have misconceptions, or where confusion exists; they can "confirm their impression of a case or can clear up confusion." Thus, in the words of another lawyer, it is helpful "where the court is troubled."

Focus

Related to clarification is the focusing of issues. The function mentioned most frequently by the judges Marvell interviewed was that "the arguments focus on the more important parts of the attorneys' positions."⁵⁷ Several federal judges have testified to this important function of argument. As Tenth Circuit Judge William Doyle observed, "[T]he lawyer is finally required to reduce his case to its lowest terms and to submit his best thinking."⁵⁸ The Seventh Circuit's then Chief Judge, Luther Swygert, testifying before the Hruska Commission, believed one of the "several benefits" of oral argument was that it "fo-

56. FIRST PHASE, *supra* note 13, at 324 (testimony of John R. Martzell). Martzell noted that "something [Judge Wright] might have missed in the subtlety of the briefs, or perhaps in the inability of the lawyer to express himself in writing, he would find in oral argument."

57. MARVELL, *supra* note 20, at 76.

58. 2 SECOND PHASE, *supra* note 47, at 826.

cuses the decision making process at a particular point and time" and "boils down the appeal to the key issues."⁵⁹ At least a majority of the judges surveyed by the Federal Judicial Center favored oral argument because, among other things, it "focuses the court's attention on the issues [and] provides the needed impetus to get the 'tough' thinking done efficiently."⁶⁰ The late Judge Frederick Hamley of the Ninth Circuit observed that judges found argument helpful because of its "tendency to narrow and pinpoint the question to be decided and the points of law to be reviewed." "The exact point of disagreement which must be resolved begins to emerge" as the attorneys present their arguments. Citing Justice Holmes, Judge Hamley said that "oral argument assists the judges in seeking just where it was that the boy put his finger in the machinery."⁶¹

The Ninth Circuit's present judges spoke along the same lines. Oral argument provides an "opportunity to narrow the issues." Because it comes after reading, it "focuses things" and allows the judges to "get to the crux of the argument." By listening to counsel, the judges can "determine what counsel thinks most salient" more easily than they can from the briefs. Oral argument also allows them "to get to the weak points" in a lawyer's argument more quickly. The result may thus be to "get concessions which narrow a case."⁶² As the "dean" of Ninth Circuit appellate attorneys, Moses Lasky, observed to the Hruska Commission, "In the course of . . . oral presentation, worthless arguments that may have taken pages and pages of the brief can be swept out very quickly."⁶³

Disposition

Both clarification and focus are related to the disposition of a case. Such focus is essential before the court can bring a case to resolution. Oral argument assists in disposition of cases in other ways as well. Among them is the opportunity—which some

59. REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, 1 HEARINGS: SECOND PHASE 408 (1974-1975) [hereinafter cited as 1 SECOND PHASE].

60. Sutcliffe, *supra* note 41, at 2.

61. Hamley, J., *quoted in* FIRST PHASE, *supra* note 13, at 777.

62. Sometimes the issues on which the judges focus are not those the lawyer thought most important. One attorney commented that oral argument is helpful when the judges "take an issue you thought minor and make it central."

63. FIRST PHASE, *supra* note 13, at 929.

judges take—to try to induce a settlement when argument indicates that the two sides are not very far apart. Certainly disposition is aided during the focusing process in arguments. The more issues set aside as peripheral, the more quickly the court can deal with key elements of a case. Professor Paul Carrington has observed that if oral argument is made too short or dealt with too quickly, “an important opportunity to test and confirm opinion is lost,” thus increasing the time required for decision.⁶⁴ Even if argument itself does not seem to facilitate disposition by limiting issues, the preparation for argument will do so. Judge Swygert has observed that “the formality of oral argument mandates a judge to prepare well so that he is knowledgeable about the facts and the law before he enters the courtroom.”⁶⁵

Ninth Circuit judges certainly see oral argument as “advancing the disposition of a case.” This is true in part, as one attorney remarked, because it saves the judges lots of time. Some circuit judges related this disposition-directed aspect of oral argument to its helpfulness in focusing a case; by sharpening the judges’ thinking, oral argument provides an “opportunity to formulate a judgment.” A judge who said it provided “reinforcement in a complex and confusing case” was also speaking of the way oral argument assisted with the case’s disposition.

Improving Assistance to the Judges

If oral argument is to be most helpful to judges, they must engage in some communication among themselves and with attorneys before argument takes place. A preargument conference can “focus the attention of the judges on the questions to be asked,” in order to “head the lawyers in the right direction at the outset of argument,” as well as give them “a few minutes of uninterrupted argument before we found some reason to interpose more questions.”⁶⁶ This means that at the beginning of the oral argument session, the judges would “state the questions which the judges would like to have discussed in the course of argument” and would also state their understanding of the issues, factual background, and of some of the leading cases bear-

64. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 558 (1969).

65. 1 SECOND PHASE, *supra* note 59, at 409.

66. Personal communication to the author from a Ninth Circuit judge.

ing on the case before them.⁶⁷

If such communication to lawyers at the beginning of argument is helpful, communication in advance of argument—for example, of the questions the judges would like addressed—can make the argument session itself more useful still.⁶⁸ As one judge recently observed, “Oral argument now brings judges and lawyers together. It could, however, be better focused.” If judges can propound questions at the beginning of a case or at the call of the morning’s calendar, indicating, “Please be sure to discuss X,” then they could also communicate with the attorneys earlier. In such a communication, the judges could indicate points in the briefs which they want further developed, those on which they want the attorneys to concentrate, and questions they want answered.⁶⁹ Certainly judges need not pose all their questions in advance of argument, but an indication of issues the judges think particularly crucial would avoid the situation in which lawyers stress matters during argument which are not the matters of primary concern to the judges.⁷⁰

At a more basic level, the judges could clearly inform the attorneys well in advance that the judges have read the briefs and other relevant materials, and could instruct the lawyer not to repeat the briefs. If a statement of this sort does not come until the call of the calendar—where it is part of the morning litany—attorneys unfamiliar with the work of the federal appellate courts, and in particular more accustomed to a “cold” bench in which only one judge seems knowledgeable about the case, may be surprised by the three-judge appellate panel’s prepara-

67. An effect of this procedure may be that lawyers, seeing the court’s understanding of the case, would abbreviate their argument or submit their cases, simply making themselves available to answer questions.

68. This and the subsequent two paragraphs are drawn from a memorandum from the author to Ninth Circuit Judge Chief James R. Browning, May 10, 1977, on the basis of having observed argument in roughly 75 Ninth Circuit cases. The same suggestions were shortly thereafter embodied in a statement submitted to the Devitt Committee’s Subcommittee on Appellate Oral Argument on June 20, 1977.

69. MARVELL, *supra* note 20, at 304 n.19. Marvell noted that such a suggestion had been made some years before by noted lawyers, one of whom, Moses Lasky, is among the most highly regarded appellate attorneys in the Ninth Circuit. Lasky’s suggestion was made in Lasky, *A Return to the Observatory Below the Bench*, 19 Sw. L.J. 679, 692 (1965).

70. If it is preferred not to inform the lawyers of the identity of a panel’s judges, questions could be transmitted to attorneys through the Clerk’s Office.

tion and may unnecessarily repeat materials they could otherwise have avoided when preparing for argument.

One objection to the suggestion that questions be submitted in advance is that heavy caseloads prevent judges from engaging in extended examination of briefs and related materials until a week or even a few days prior to argument, thus not allowing enough time to transmit questions to attorneys. Yet, if more effective oral argument is to be encouraged, communication of questions to attorneys as late as one or two days prior to argument is better than doing it on the day of argument or not at all. Moreover, by having their clerks prepare questions as they summarize the briefs, judges, after examining the questions, could give attorneys an earlier indication of the issues they wanted emphasized in argument.⁷¹ In cases in which staff attorneys have prepared a bench memorandum, questions could be prepared as part of the memorandum. The presiding judge of a panel might assume particular responsibility for such advance "checking" and for any necessary communication with other judges on the panel.

Another idea was suggested by a judge who speculated that, because he didn't always know what questions to ask, "maybe we should have argument after opinions." (He also suggested a second round of oral argument in "big cases" after the court had written its opinions.) He derived his suggestion in part from comments by some attorneys who had said they would prefer to respond to judges' drafted opinions. The idea is not unlike that developed at greater length by Marvell, who, because of his concern about "the lack of communication back and forth between counsel and the court to iron out exactly what points interest the court so that counsel can give information the court needs,"⁷² proposed that the court circulate a tentative draft of its opinion *before* argument. While some judges resist such suggestions because they believe it violates the spirit of the adversary system, and others fear that their views—and their colleagues'—will become frozen too early and easily, such a mechanism certainly would communicate to lawyers the issues in a case which the judges want the lawyers to address. Like any

71. See notes 148-149 *infra* and accompanying text.

72. MARVELL, *supra* note 20, at 247.

mechanism for effective communication, it would result in "the judges [putting] a good deal of work into a case early, in time to tell counsel of their concerns and to give counsel a chance to prepare answers."⁷³

C. ASSISTING THE LAWYERS

If the judges were assisted by argument in the ways just discussed, how were the lawyers aided? "[A]ttorneys, like the judges, nearly always consider the arguments important. . . . [They] believe the importance of arguments lies mainly in the chance to stress major points and to answer questions from the bench."⁷⁴ Although the Ninth Circuit lawyers did not stress the opportunity to answer questions, like the judges, they believed clarification was a particularly salient function of oral argument. They believed communication to the judges and the opportunity to persuade and prod them was also important.

Communication

Just as oral argument helps judges in establishing a communication process, it is similarly helpful for the lawyers. One important dimension of a case is "the opportunity to discourse with the court, and to argue and discuss with the court, or share ideas."⁷⁵ Oral argument also provides an opportunity for the lawyer to get "his points firmly lodged in the judicial mind."⁷⁶ Several Ninth Circuit judges noted that oral argument was particularly helpful for lawyers who perform better orally than in writing. "[A] lawyer may be a better talker than a writer" or may not be able to write very effectively. The Ninth Circuit attorneys talked about the communication process in somewhat different terms, however. The most basic comment was that oral argument was helpful because it "allows face-to-face contact between an attorney and the court." Beyond that, it produces an exchange between attorneys and judges, and allows the lawyer "to grapple with a mind which has already come to grips with the problem" in a case. Argument is also thought to provide an opportunity to sense the court's problems and to deal with them or to work through problems bothering the judges.

73. *Id.* at 248.

74. *Id.* at 78.

75. FIRST PHASE, *supra* note 13, at 322 (testimony of Samuel C. Gainsburgh).

76. *Id.* at 66 (testimony of Orison S. Marden).

Beyond such exchange, an important, but seldom noted, element of the face-to-face contact of oral argument is the messages which can be communicated implicitly. If a lawyer appearing before the court tells the panel members that the lawyer's client is present, the judges "understand that some of the things he says are for the benefit of the client, who came to hear them said." Such candor is appreciated, and may result in fewer questions from the bench.⁷⁷

Information

Oral argument also allows lawyers to give the judges information. Such information may include "background details" of a case or material not covered in the briefs, information about new cases, or an "update" on what has been decided since the briefs were filed. Oral argument may also give lawyers the feeling that they should file supplemental briefs in order to give the court more information.

Clarification

For the attorneys, as for the judges, clarification is a particularly salient function of oral argument. Argument is "enormously beneficial in illuminating . . . precisely what the issues are as counsel sees them."⁷⁸ Moreover, they can "cure factual misapprehensions and legal misconceptions," "the two areas that can be met only by oral argument."⁷⁹

Attorneys "can make things clearer [at argument] than in the briefs." Both factual matters and legal arguments are clarified during argument. As one veteran civil liberties lawyer put it, oral argument "clarifies issues in the event the judges have a misconception." A lawyer predominantly involved in criminal defense work believed that because judges on a panel are seldom uniformly informed about a case, oral argument usually serves to clarify the view of the one judge badly in need of help with the case. (As a Ninth Circuit judge put it, oral argument "can bring the judge back into the ballpark.")

Also involved in clarification is the "opportunity to explain

77. Personal communication from a Ninth Circuit judge to the author.

78. 1 SECOND PHASE, *supra* note 59, at 350 (testimony of Melvin Wulf).

79. FIRST PHASE, *supra* note 13, at 804 (testimony of Frank Pozzi).

seeming contradictions, inconsistencies or weaknesses in the client's position." Similarly, argument "can produce an exchange which enables the attorney to recognize and clarify confusions and misapprehensions which judges have." When an attorney senses problems a court is having with a case, the lawyer can "develop a new theory to deal" with those problems. An extremely experienced lawyer pointed out that one advantage of such clarification is that by "articulating the nuances of argument," a lawyer could show judges that they don't "have to go to an extreme in using the lawyer's argument." They could decide the case for him and yet continue their control over future development of doctrine.

Focus

Perhaps the most crucial element of focusing a case through oral argument is the direct emphasis which can be placed on the most important issues. At argument, the lawyer can provide "the crystallized oral statement of the 'gut issue'," ⁸⁰ or, as Judge Bright put it, "to present their theory of the case in a nutshell" ⁸¹ Related to the focusing function of argument is the response of roughly three-fifths of the attorneys surveyed by the Federal Judicial Center. They believed that oral argument "allows counsel to gauge the feelings of the judges and to couch his arguments accordingly." ⁸² This may help the attorney not only in the present case but in the future as well. As a Ninth Circuit attorney observed, argument "educates the attorney for the next time."

Focus in oral argument may involve discarding certain issues. If argument reveals flaws in a lawyer's argument or "confirms the inadequacy of some arguments in the briefs," the court does not have to deal with those matters. Moreover, during argument, a lawyer may "signal . . . that one or more points in his brief are not well taken." This allows the judges, who realize he has included these points "to satisfy his client," to "pay more attention to what he says about his important points." More-

80. *Id.* at 794 (testimony of a group of Oregon lawyers).

81. Bright, *supra* note 22, at 506.

82. DRURY, ET AL., *supra* note 8, at 38 (Table 26). See the comment by one Ninth Circuit attorney that at argument lawyers could "test the judges' disposition."

over, the lawyer gains “a little extra credit for his candor.”⁸³

Prod and Persuade

Oral argument also provides lawyers an opportunity to persuade the members of the panel. One senior circuit judge called particular attention to the “forcefulness, preparation and dedication” of particular attorneys that makes oral argument helpful. In talking about persuading the court, attorneys had several things in mind. Several simply said bluntly that oral argument was helpful “to persuade the court” or “to sell your theory.” You can “take them where you want to go.” This, however, has several facets. In the first place, one must “catch their attention” or “stimulate their minds into active thought processes.” Having once engaged the judges, one might try to persuade them by correcting their views of a case. One can “challenge the judges’ concept of a case” or “make the judges re-examine their positions.” For example, an attorney with considerable experience in insurance cases found oral argument helpful in overcoming myths about the accuracy of insurance contracts.⁸⁴ Oral argument also allowed attorneys to try to disabuse the court of its predilections about trial judges, a number of whom have good reputations with the court of appeals.

III. ORAL ARGUMENT’S IMPORTANCE

A. RELATIVE IMPORTANCE AND SIGNIFICANCE

There are a number of ways to determine whether judges and lawyers believe that oral argument is equally important in all cases. When one asks directly, a large majority of both Ninth Circuit judges and lawyers respond that oral argument is *not* of equal importance in all cases. Only three of fourteen circuit judges, two of nine district judges, and only four of eighteen attorneys believed that it was of equal importance in all cases.

Another way is to determine whether certain types of cases are thought to warrant *longer* argument. All judges responding to the Federal Judicial Center survey, while stressing “varied sets of criteria” in determining the appropriate time-length for

83. Personal communication to the author from a Ninth Circuit judge.

84. These myths included the idea that all insurance investigators were careful and that all insurance contracts were well-written. /

argument, indicated "that a case-by-case method is mandatory with an examination of issue complexity and nature of record and briefs as a starting point."⁸⁵ No Ninth Circuit judge, and only two district judges, believed in 1977 that all cases required the same amount of oral argument time. This did not mean, however, that all judges would set particular time limits in advance. One senior judge argued strenuously that such a practice, which may be based on "only a clerk's opinion," "creates the impression you've decided the case." He believed the length of argument could be controlled from the bench "without predigestion" of the case.⁸⁶ According to a colleague, one had to "follow the play" in determining whether or not more argument was necessary.

Until 1977, the Ninth Circuit, unlike some other U.S. Courts of Appeals, had not designated in advance the time each side was allowed for argument. At the call of the calendar each day, the presiding judge would inquire of counsel how much time was needed. This procedure not only hindered planning by attorneys, but was often time consuming, and on occasion took more time than was saved by judges indicating that counsel did not need all the time requested. Such exchanges also left attorneys with the feeling that the court was discouraging oral argument and sometimes hindered the rapport which facilitates the exchange between judges and counsel.⁸⁷ Despite these considerations, not all lawyers desire the structure provided by indicating time in advance and general time limits also make lawyers unhappy.⁸⁸ In his Hruska Commission testimony, Moses Lasky argued, "There should be no official limitation on the time for arguments," which should last as long as necessary for the judges "to squeeze all the values out of it that they can get out." That would not mean endless argument, Lasky said, citing an aphorism attributed to Abraham Lincoln that "when asked how long should a man's legs be, he replied, 'Long enough to reach the

85. Sutcliffe, *supra* note 41, at 1.

86. At the same time, although the judge thought "our system creates self-discipline among the bar," he favored maintaining a "ceiling" on the amount of argument per case unless it was lifted on the lawyer's request.

87. In June 1977, on the recommendation of the author, the Judicial Council of the Ninth Circuit adopted the policy of recommending length of oral argument in advance, as well as of informing attorneys that the judges had read the briefs in advance of argument. See note 68 *supra* and accompanying text.

88. See e.g., FIRST PHASE, *supra* note 13, at 304 (testimony of Joe D. Hall).

ground.’” Often this could be accomplished in ten or fifteen minutes, but in “other situations the court would profit if the argument went on for hours.”⁸⁹

Ninth Circuit Judge John Kilkenney, responding to complaints about limitations on oral argument, has said he was “convinced that oral argument is helpful in far less than ten percent of the appellate cases,” adding, “in less than two percent of the hundreds of cases I have heard upon appeal has my decision been influenced by the arguments.”⁹⁰ Asked in the 1977 interviews to estimate the percentage of cases in which oral argument was “significant,” the Ninth Circuit judges gave widely varying answers. Circuit judges’ estimates ranged from “very low” and five percent, to “two-thirds in varying degree” and seventy to eighty-five percent, but only five gave estimates of over ten percent. The highest estimate was made by a judge relatively new to the court; he linked his response to the “present calendar situation,” that is, the number of cases facing the court and the amount of time allotted to argument.

Several judges commented specifically about criminal cases, one noting that oral argument was helpful in well over half the cases if one excepted the criminal cases. Another judge argued that oral argument in criminal appeals, most of which were “crappy,” was not significant. Because the judges lacked “contact” with the cases, he would dispose of most of them without argument. Several judges were, however, particularly sensitive to providing oral argument in criminal appeals to maintain the appearance of justice, and the Ninth Circuit had been reluctant to screen criminal cases for “no oral argument” even when the court had done so for civil cases. Only three district judges estimated that oral argument was significant in more than one-fifth or more of the cases; one-third was the highest estimate. Five percent was the lowest, with a couple of estimates in the area of ten to fifteen percent. “Most appeals are frivolous,” said one judge who supplied a ten percent estimate. One colleague who did not feel oral argument significant “in this context” said that briefs were the “most significant element” in a criminal case.

89. *Id.* at 932.

90. *Id.* at 811.

Given these estimates, in what percentage of cases was argument "determinative"?⁹¹ Judge John Minor Wisdom of the Fifth Circuit told the Hruska Commission that there were cases in which "I have made up my mind and I have gone into court with one mind, and came out . . . of a different mind."⁹² First Circuit judges indicated that "in perhaps one or two cases per term out of approximately twenty-five cases heard, oral argument may bring about a change in the court's result." They also noted that oral argument also "alters the scope, remedy or possibly dicta of a case but not necessarily the final outcome in perhaps as many as a fourth to a third of cases heard."⁹³

The Ninth Circuit's late Judge Hamley earlier observed that "[e]very appellate judge has had the experience of going to the bench with a rather firm tendency for one side or the other, based upon a reading of the briefs, only to have his mind changed as a result of the oral argument."⁹⁴ Although he found these to be "rare cases," Judge Duniway had seen oral argument affect the result in cases "where it was recommended by two of the three judges on the panel that we not hear argument, [but] another judge said, 'yes, I think we better.' It went back to the regular oral argument calendar and the decision came out the other way from what it probably would have without it."⁹⁵ His view was echoed in the 1977 interviews by the observation that oral argument was determinative in those "small cases" in which, without argument, "we would have just handed down an order," but where, because of the questions raised, the judges would go back and study the case. (However, because "we al-

91. Like "significant" in the previous question, "determinative" was not further defined when the question was asked. When a judge inquired as to its meaning, the interviewer said he was interested in cases in which oral argument made the judge change his mind or made the essential difference in the case.

92. Judge Wisdom said this happened "whenever there is oral argument," but "it doesn't happen often, and . . . those are the cases that are the tough, the difficult cases." FIRST PHASE, *supra* note 13, at 366-67. In evaluating this statement, one must keep in mind that the Fifth Circuit made heavy use of screening cases for "no oral argument" and summary affirmance. Note the earlier comment by Second Circuit Judge J. Edward Lumbard that "the impression from reading the briefs is frequently changed or modified by the oral argument." J. LUMBARD, *APPELLATE ADVOCACY* 9 (1962), *quoted in* M. SCHICK, *LEARNED HAND'S COURT* 93 (1970).

93. Corey, *supra* note 32, at 21-22.

94. Hamley, J., *quoted in* FIRST PHASE, *supra* note 13, at 777.

95. *Id.* at 902. Unanimity among the three judges of the panel is required for the judges to dispense with oral argument. See note 14 *supra* and accompanying text.

ways go back and write an opinion and study more," the judges observed, in no case was oral argument really determinative.)

Oral argument has been determinative in at least some cases for all Ninth Circuit judges and six of nine district judges interviewed. As expected, the percentage of cases in which argument was thought determinative was much smaller than the proportion in which it was felt significant. No judge who made numerical estimates placed the figure much over ten percent,⁹⁶ with the lowest estimate one-tenth of one percent of the cases. For other judges, argument was determinative in "relatively small," "small," or "minimal" numbers of cases, or "very few" or "not many" cases.

B. WHERE MOST HELPFUL?

Given that most Ninth Circuit judges and lawyers did not find oral argument of equal importance in all cases, in what types of cases was it most or least helpful? Goldman's survey of all federal judges showed that a majority of circuit judges thought oral argument "essential" in "cases that involve matters of great public interest despite the absence of substantial legal issues."⁹⁷ In only one other category—cases involving the constitutionality of a state statute or state action—did a majority of circuit judges think argument was essential. In civil appeals based on sufficiency of the evidence, only nine percent of the circuit judges consider argument essential.⁹⁸

In indicating when oral argument is most helpful, most Ninth Circuit judges answered in terms of specific legal subjects and more general case characteristics. Attorneys answered totally in terms of the latter. (Two circuit judges did say it depended on the individual case.) No judge found oral argument more helpful in criminal appeals. All but two judges (one who

96. Three put the figures in the 5-10% range and another said it was 10% \pm 3%.

97. GOLDMAN, *supra* note 8, at 8.

98. *Id.* at 8 (Table V). The only other categories where substantial proportions of circuit judges found oral argument essential were direct criminal appeals (38%) and *en banc* cases previously heard by a panel (35%); as to the latter, *see* note 128-132 *infra* and accompanying text. Between 15% and 20% of the circuit judges thought argument essential in cases where prisoners sought alteration in prison conditions, or attacked state and federal convictions collaterally, or in diversity of citizenship cases raising only state law questions.

mentioned admiralty and the other, civil cases generally) thought oral argument most helpful in areas of government regulation, for example, in regulatory agency cases generally, "novel areas" of the law—such as environmental regulation—involving new statutes and new administrative agencies, or specific areas of regulatory law, particularly antitrust and patent law. Tax law was mentioned by several judges, one thought that tax lawyers were good appellate attorneys. A colleague mentioned labor cases because of the exceptionally high quality of National Labor Relations Board and attorneys. Federal specialties like antitrust, tax, admiralty, and patent were identified by one judge as those in which "you are dealing with experts in that field," thus making oral argument most helpful because the "parties [were] represented by able counsel."

The relative length of time thought necessary for oral argument is another indicator of the types of cases in which oral argument is thought more helpful. Judges' responses concerning the types of cases in which longer argument was necessary make extremely clear that complexity (legal or factual complexity or cases with multiple issues, "no matter how simple each point in the case," or criminal cases with multiple defendants) leads to a need for a more extended exchange of views between judges and counsel. Specific areas of law in which longer argument was said to be necessary were few; however, several judges referred to antitrust, patent and securities, and several others referred to complicated civil cases in general. Only one judge, a district judge, specifically suggested that longer argument was needed in more complicated criminal cases, in particular naming complicated conspiracy cases "with more law involved."

Among judges who emphasized case characteristics, some talked about the state of the law. Oral argument was thought most helpful when the court was developing new law, or was on "the edge of an area left open by the Supreme Court," where there were conflicting authorities in the circuit or "conflicting guidelines but no strong precedent," or where policy choices were involved and "you need to be persuaded on a [basis] other than precedent." Both circuit and district judges asserted that oral argument was more helpful in "complex cases with multiple issues," "where many factors are impinging on each others," or where "there is a very large record" or where the lower court's

findings were inadequate or confusing. In the latter cases, argument was “useful to illuminate which facts have the greatest bearing on the legal issues.”

Lawyers in the Second, Fifth, and Sixth Circuits considered oral argument essential in “cases which involve matters of great public interest (despite the absence of substantial legal issues) [and] cases involving the constitutionality of a state statute or a state action.”⁹⁹ Half the Sixth Circuit attorneys and a clear majority of Second Circuit lawyers also found oral argument essential in direct criminal appeals. Inter-circuit differences in the lawyers’ responses could be explained in part by differences in the circuits’ argument practices.¹⁰⁰ Comparing these lawyer preferences with the judge preferences noted above,¹⁰¹ Goldman found that “the essentiality of oral argument varies from case-type to case-type for judges and lawyers with order of preference almost the same from the perspective of bench and bar.” However, “oral argument is viewed as essential to a greater degree by lawyers than by judges for all case-types.”¹⁰²

Although some Ninth Circuit lawyers said oral argument was helpful “where there is *any* arguable issue” or “where points of law are debatable,” attorney responses centered on the complexity and novelty of cases. For example, in cases with “sensitive, complicated, political issues” where one’s argument ran counter to the judges’ prevailing sentiments and where one was trying to move the law, or a “complicated factual pattern” in cases with lengthy trials and voluminous transcripts, because it could “cast light on the transcript.” Argument was also more helpful with “novel or undeveloped legal issues,” “issues of first impression,” “changing fields of law,” or “unsettled legal questions or their offshoots,” or when one was “trying to articulate an exotic and esoteric theory,” particularly one which you

99. DRURY, ET AL., *supra* note 8, at 22.

100. GOLDMAN, *supra* note 8, at 20-21. The Second Circuit had oral argument in every case, but decided a number of cases from the bench without opinion; in the Fifth Circuit, there was “extensive use of truncated procedures,” *id.* at 3, with “no oral argument” in a high percentage of cases. The Sixth Circuit, by contrast, had retained a relatively traditional operation in terms of oral argument. For an examination of the effects of screening and summary procedures in the Fifth Circuit, see Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U.L.Q. 257.

101. Notes 97-98 *supra* and accompanying text.

102. GOLDMAN, *supra* note 8, at 8-10.

couldn't get across on paper.

C. WHERE LEAST HELPFUL?

According to some judges, argument was least helpful in cases controlled by the circuit's precedents—in a “single issue case with the issue foreclosed by twenty years of precedent,” or “where the law in the Ninth Circuit is clear and the court had repeatedly declined to change the rule.” In such cases, “the work is largely mechanical.” For more of the judges, oral argument was not helpful in “frivolous cases,” “simple cases,” or “factual, run-of-the-mill” cases, particularly if, like sufficiency of the evidence cases, they were largely factual in nature. These were most often criminal cases. In an extensive comment, one circuit judge said that oral argument was least helpful in Criminal Justice Act appeals from convictions by a “very able” judge and a “very able” jury. Because the government provides a free lawyer, an accountant, and a psychiatrist, the convicted says “Why not?” to an appeal. These cases, he added, don't take the court long to decide.¹⁰³ One circuit judge was particularly harsh, referring to “many quasi-frivolous cases, stupid cases which should not have been appealed.” In this context, one might note that criminal cases were prominent among those the judges thought deserved shorter argument. Examples were routine search and seizure cases, as well as “one-issue, substantial evidence cases,” “single, simple issue” cases, and those with “non-highly complex factual issues.”

Only one judge spoke in terms of the lawyers. He said that lawyers for the management side in labor cases and patent lawyers, the latter because they did not do much advocacy work, were less effective, and thus made oral argument less helpful than lawyers working in other areas of the law. One reason why attorneys may not make most effective use of appellate argument is that relatively few lawyers have tried appellate cases, and still fewer have done so in the federal courts. Although an individual attorney may possess both the skills of a trial lawyer and those of an appellate attorney, the skills can be quite different. Attorney specialization, often in trial work or appellate

103. He added that the court approaches such cases by assuming the world would not be interested in them; thus many are handed down as “Not for Publication” decisions. They do not, he said, add anything to the law.

work, increases the likelihood that attorneys will have one skill but not the other. That a lawyer has learned how to conduct discovery, to examine and cross-examine witnesses, and to make an effective argument to a jury (or to a judge in a bench trial) does not necessarily mean the lawyer will have learned how to focus succinctly at appellate oral argument on the crucial points of a brief or to answer the often rapid-fire questions put by a "hot" bench of three federal judges, all of whom have read the briefs and have come to the bench well versed in the case and prepared with trenchant questions. (Even those lawyers with considerable state appellate experience are often unfamiliar with this experience, because many state courts have "cold" benches, where at most one judge asks questions.)

Although separate data for the Ninth Circuit is not available in the Federal Judicial Center's study of lawyer competence, responses reported in the study cast some light on the types of lawyers thought least effective in appellate argument. According to the study, "a majority of the judges believe there is a serious problem among lawyers employed by state or local governments." On the other hand, less than ten percent thought such a problem existed among "public or community defenders, Justice Department lawyers other than those in United States attorneys' offices and on strike forces, and private practitioners representing corporate clients in civil cases."¹⁰⁴ Neither age, the size of the lawyer's office, previous courtroom experience, nor educational background of the lawyers was related to the judges' ratings.¹⁰⁵ Comparing lawyers' ratings with those made by the judges, the report stated: "At both the appellate and trial levels, lawyers seem to be markedly less critical than judges of United States attorneys and assistant United States attorneys, and markedly more critical of appointed defense counsel."¹⁰⁶

Ninth Circuit lawyers suggested few types of cases in which they found oral argument least helpful, perhaps not surprising because of their commitment to having oral argument. A few

104. PARTRIDGE & BERMANT, *supra* note 7, at 25.

105. *See id.* at 203 ("The data from the appellate courts do not show a markedly higher inadequacy rate among young lawyers or recent graduates."). *See also id.* at 200 (office size), 203 (previous courtroom experience).

106. *Id.* at 195.

did, however, make suggestions in terms of case characteristics. They generally did not mention specific subject-matter areas, although one, involved in criminal appeals, said argument was least helpful on questions of the propriety of the judge's instructions or on the admissibility of evidence, and another talked of "factual search and seizure" cases as ones in which argument was not particularly helpful.

Lawyers also thought oral argument least helpful where the briefs were short and the issue simple, where there was a simple fact pattern and "no novel legal questions," or "where the law is static." Similarly, oral argument could not achieve much where the result was almost predetermined, "open-and-shut," "where one pretty much has an idea how the case was going to go," or where it is "hopeless on the theory, law *and* facts." Put differently, not much is achieved "where the appeal should never have been taken" because the lawyer was "ignorant" or saw the legal process as a "slot machine" and had hoped "lightning may strike." Closely related were cases in which "appeals were taken because they must be taken," for example, in criminal appeals with appointed appellate counsel. However, in a comment which runs counter to the view of most judges and lawyers that argument is least helpful on simple matters and most helpful in complex ones, one lawyer found oral argument not helpful "when the lawyer was trying to overturn old legal principles and establish new rules of law," as in changing from the *M'Naghten* rule to the A.L.I. insanity defense or from contributory to comparative negligence. Such matters, he believed, were best argued in the briefs. As Hruska Commission Executive Director A. Leo Levin stated during the Commission's hearings:

It's been argued fairly cogently before the Commission, particularly in the Ninth Circuit, that sometimes the most difficult case is one which involves basic policy considerations which the various judges have thought about quite a bit. And it's precisely that kind of case which doesn't need oral argument. Oral argument wouldn't illuminate things very much.¹⁰⁷

Both judges and attorneys have also identified situations in which oral argument does not help at all. Given the general posi-

107. FIRST PHASE, *supra* note 13, at 503-04.

tive orientation both have toward oral argument, it is not surprising that there are fewer comments about such “nonhelpfulness” than there were about ways in which argument was found to be helpful. While most judges focus on deficiencies in argument, a few suggest that good briefing makes oral argument less useful, that oral argument is not helpful when briefs are adequate and “address the issues and are cogent” or when judges and lawyers agree as to what is the principal argument.¹⁰⁸

Both judges and lawyers stressed lack of *attorney skills* as contributing to making oral argument not helpful. Judges believed that, in a number of cases, lawyers are of little help to them because they are “not well prepared,” do not “know what oral argument is for” and are not “up to it,” or are generally “ineffective.” A lawyer “not skilled at appellate work” can confuse the judges. Lawyers are also not helpful when they are “not good on their feet when asked questions.” In addition, a lawyer must remain “on the point” and must be “interested in the judges’ views and questions” to be helpful. “Unskilled advocates” can “hurt their case and should shut up,” say the lawyers who talk about the damage caused by “boring, incompetent presentations.” It is quite important that lawyers not “misread” the judges’ positions and concerns. If lawyers “take too rigid a position,” they also will deprive oral argument of its usefulness, just as they will by making an argument they know is not valid, thus “losing credibility” with the judges.

The attorneys also talked about *judge characteristics*, seldom mentioned by the judges themselves. Only one circuit judge commented on oral argument not being helpful because of other judges. For him, it loses its helpfulness where one judge preempts much of the argument time “and tells what he knows or what he did in private practice.” Other judges believed using a disproportionate amount of time by asking many questions makes oral argument unhelpful for the entire court. The lawyers

108. Although some judges believed oral argument was *helpful* when the briefs were poor because the attorney might make his point better orally than in writing, others believed argument was *not* helpful where the briefs were poor, because poor briefs usually meant poor argument. See the comments by Judge Hufstедler, *FIRST PHASE*, *supra* note 13, at 984 (“There are occasions in which the performance by counsel as demonstrated by the briefs as already filed, gives one no sense of comfort whatever that the performance in oral argument is going to be any better. And that means it won’t be any help at all.”).

were concerned that some judges were "disinterested," "not inclined to listen," or "impatient," and appear to "have made up their minds," or had "not prepared sufficiently to ask probing questions."

Judges often noted, and lawyers mentioned with some frequency, situations in which lawyers read their presentations, and judges also cited lawyers making speeches. A few mentioned lawyers reciting facts. Both judges and attorneys agreed that when a lawyer simply reads the briefs, summarizes or "rehashes" them, oral argument is less than helpful.¹⁰⁹ Recitations of facts not related to the law, when an attorney "talks facts without weaving them into the law," are similarly not helpful. Oral argument was not helpful, added a judge, if a lawyer "talks about things we already know." Lawyers who make speeches, engage in fancy rhetoric, or make an "impassioned jury plea to an appellate judge," are also considered ineffective. Oral argument is thus not helpful when lawyers "think they are arguing to a jury instead of recognizing that judges have specific ideas they are interested in." Comments about a "just result" are, however, appropriate, if they are related to the law, but not helpful "when an attorney forgets the law" and talks only about the just result.

Judges noted the preparation time which must be given to oral argument; this was only infrequently mentioned by lawyers. Those participating in oral argument made judgments about its benefits in relation to the time they had invested in it. Thus, for one lawyer, it was "time-consuming" when it did not change judges' minds. The amount of time expended by "lots of others" (judges and clerks) before argument meant for one judge that oral argument might "not add anything significant," although the preparation would be helpful in sharpening judges' thinking and in moving the case toward disposition. The lapse of time between oral argument and when judges worked on opinions is also thought to decrease argument's helpfulness.

D. IS ORAL ARGUMENT DISCOURAGED?

Given judges' views of the sometime lack of assistance from oral argument and their willingness to limit it in some cases, did

109. See S. Ct. R. 38 (effective June 30, 1980) ("*The Court looks with disfavor on any oral argument that is read from a prepared text.*")

the judges discourage argument? The lawyers were almost evenly divided as to whether the court discouraged oral argument; eight of eighteen said that the court did so in one way or another; two others indicated that the court was "beginning" to do so or that "it's coming." The view that oral argument was not discouraged was best stated by the attorney who, having argued in all the courts of appeals, found the Ninth Circuit to be "a good court." "[I]nept or repetitious" argument was discouraged but "they are glad to listen to quality oral argument which will assist them."

Some judges "don't like to have you take your full time," said one lawyer; other lawyers noted statements at the beginning of a day or of a case that indicate a distaste for argument. Indeed, "some panels are vociferous in applauding attorneys who submit cases, and act displeased with oral argument." One attorney who commented that lawyers "got a rough time when they didn't submit on the briefs" nonetheless added that he had "never been turned down." The court discouraged oral argument by starting the calendar in San Francisco "too early in the morning" for an out-of-town attorney to fly in for that day, by having "long calendars," "by having their rules on oral argument at all," and by their regular *pro forma* announcement when they came on the bench. A lawyer arguing before the court "has a sense from the demeanor of the court that they would prefer you to keep your remarks short." However, another attorney believed the judges should stress *more* that they had read the briefs—part of the morning litany—so lawyers would get on with the heart of their argument.

IV. ELIMINATION OF ORAL ARGUMENT

A. INTRODUCTION

"To mandate oral argument in every case would clearly be unwarranted."¹¹⁰ So stated the Hruska Commission in 1975. The Commission did say, however, that it would also be inappropriate to ignore "risks to the process of appellate adjudication inherent in too-ready a denial of the opportunity orally to present a litigant's case."¹¹¹ At roughly the same time, the Advisory

110. STRUCTURE AND INTERNAL PROCEDURES, *supra* note 4, at 107.

111. *Id.*

Council on Appellate Justice recommended that "oral argument should be allowed in most cases. It may be curtailed or eliminated in certain instances. Alternatives to oral argument through personal audience should be considered by appellate courts."¹¹² The Third Circuit's judges also said that oral argument could be dispensed with.

If all three panel members, after having studied the briefs, which generally are in their hands for a month before the decisional conference, conclude that oral argument would do little to advance the decisional process, it is difficult for us to imagine that even the most eloquent counsel will advance his client's cause by subjecting them to a compulsory argument.¹¹³

Yet advocates of the contrary position continue to hold strong views. The president of the Mississippi State Bar Association told the Hruska Commission: "If [a] case is of sufficient importance to hire an attorney, to go to the expense of a trial, and to go to the expense of preparing records and briefs on appeal, it certainly ought to be of sufficient importance to justify the time of three judges . . . in hearing the oral argument."¹¹⁴ A Mississippi colleague, arguing against fifteen-minute limits on argument, asserted, "Any case that is of sufficient complexity to be in the Federal Court and be on appeal deserves more than fifteen minutes. A lawyer just can't present his case, which has any complexity at all, in fifteen minutes."¹¹⁵ In 1974, the American Bar Association's House of Delegates adopted a resolution proposed by its Committee on Federal Practice and Procedures:

Be It Resolved, That the American Bar Association express its opposition . . . to the rules of certain United States courts of appeals which drastically curtail or entirely eliminate oral argument in a substantial proportion of nonfrivolous appeals and, *a fortiori*, to the disposition of cases prior to the filing of briefs.¹¹⁶

112. Recommendations of the Advisory Council on Appellate Justice, *summarized in* 7 THIRD BRANCH 6 (Nov. 1975).

113. FIRST PHASE, *supra* note 13, at 62 (responding to a statement by a committee of the Philadelphia Bar Association). *See id.* at 58-59.

114. *Id.* at 438 (testimony of Joe H. Daniel).

115. *Id.* at 436 (testimony of Vardaman Dunn). Dunn added, "The most that he can do would be to answer a few questions by the judges."

116. Res. ABA House of Delegates, *printed in* 60 A.B.A.J. 1214 (1974).

B. CURTAILING ARGUMENT

The Federal Judicial Center's surveys show clear differences between judges, and lawyers beliefs on the limitation of argument. "Approximately ninety percent of the judges felt that there are occasions when elimination of oral argument is an acceptable procedure."¹¹⁷ Eighty-eight percent of the circuit judges found denying oral argument "ever acceptable," but the percentages of lawyers agreeing ranged from a low of sixty-seven percent in the Second Circuit to a high of eighty-four percent in the Fifth Circuit, with Sixth Circuit attorneys falling in between at seventy-two percent.¹¹⁸ All the circuit judges believed it acceptable to limit oral argument to fifteen to twenty minutes for each side, a position with which over ninety-eight percent of the lawyers agreed.¹¹⁹ Both judges and lawyers were less willing to limit oral argument to fifteen to twenty minutes per side and to deny oral argument completely in cases in which the reason was "avoidance of extreme delay" than when an appeal bordered on being "frivolous" (in the court's eyes) or where the issues were clear and could be decided by reference to precedent. While roughly ninety-five percent of judges were willing either to limit or eliminate oral argument in frivolous cases, and similarly high percentages were willing to do so in cases governed by precedent (ninety-seven percent to limit the time per side, and eighty-nine percent to eliminate), the proportions declined when the reason was to avoid extreme delay. In that case, eighty-six percent of the judges found limiting the argument time acceptable, but only sixty-two percent of the circuit judges found eliminating argument ever acceptable.¹²⁰ The lawyers showed a similar pattern, although the "fall-off" from the percentage willing to limit time for argument to those accepting elimination of argument was far greater than for the judges. The range of proportions ever willing to accept eliminating oral argument for reasons of delay-avoidance ran from twenty-nine percent in the Second Circuit to forty percent in the Fifth Circuit.¹²¹

117. GOLDMAN, *supra* note 8, at 5.

118. *Id.* at 13 (Table III); DRURY, ET AL., *supra* note 8, at 19 (Table 13).

119. GOLDMAN, *supra* note 8, at 13 (Table III).

120. *Id.* at 7a (Table IV).

121. DRURY, ET AL., *supra* note 8, at 20 (Table 14). Differences between those willing to curtail, and thus willing to eliminate, oral argument in cases clearly controlled by precedent was also much greater for the lawyers—less than ten percent for the judges, *see* GOLDMAN, *supra* note 8, at 7a (Table IV), but more than 30% for the lawyers.

A clear majority of judges saw oral argument as dispensable in two types of cases: prisoner petitions seeking alteration of prison conditions, and collateral attacks on federal and state convictions. Almost half the judges also thought oral argument could be eliminated in sufficiency of the evidence cases. However, only seven percent of circuit judges thought that courts could dispense with argument in "cases which involve matters of great public interest despite the absence of substantial legal issues."¹²²

Not surprisingly, a greater proportion of judges than of attorneys—who prefer to add judges than to adopt "truncated court procedures"—¹²³ thought oral argument was dispensable for each type of case.¹²⁴ In no case category did a majority of attorneys agree that oral argument was dispensable, although the proportion rose to around thirty percent for prisoner petitions concerning prison conditions and for diversity of citizenship cases raising only state law questions.¹²⁵ Furthermore, when faced with limitations on traditional procedures (including oral argument), the lawyers were less willing to accept limitations "to the extent that they accept [them] at all," when used for "administrative reasons" than when they are used for "substantive legal reasons."¹²⁶

All Ninth Circuit judges and district judges interviewed believed that oral argument could be eliminated in some cases. Four of twelve circuit judges did think, however, that eliminating oral argument would not "assist the court in completing its business." As a further test of the effects of eliminating oral argument, the judges were asked whether there had been cases in which argument had *not* been heard but the judge later felt it might have been helpful. Six of nine circuit judges said there were such instances, and three of four agreed that this was more

122. GOLDMAN, *supra* note 8, at 11 (Table VI).

123. DRURY, ET AL., *supra* note 8, at 16.

124. GOLDMAN, *supra* note 8, at 12.

125. DRURY, ET AL., *supra* note 8, at 24 (Table 16). The differences among the three circuits were less severe for the dispensability judgments than for the judgments that oral argument is essential. However, "[i]n the Second and Sixth Circuits, where oral argument is generally allowed, the idea that oral argument should always be accorded unless the appeal is frivolous received the greatest support." *Id.* at 47. See also text accompanying note 118 *supra*.

126. DRURY, ET AL., *supra* note 8, at 19.

likely to occur when they were writing the panel's opinion.

Only a bare margin of attorneys agreed that the court could dispense with argument. One assistant U.S. attorney, who said that the court "could do away with oral argument in more cases," said he "would just as soon submit all cases on the briefs," but a half-dozen attorneys commented negatively. Although attorneys should be allowed to waive it, oral argument "should never be eliminated by force" because the judges may be confused about a case and not know they are confused. One lawyer with extensive experience before the Ninth Circuit believed there should be no case without oral argument, even if it were for five minutes, so a lawyer could "give some view" of the situation even if all the relevant cases were against him. Another veteran appellate counsel would have placed no time limit on argument. He would allow all attorneys at least three or four minutes, and then have the judges tell the lawyer to sit down if he were not saying anything helpful. Although the courts were in the best position to "control" oral argument, said another, each attorney should "still have the opportunity to say something, however brief," because few cases were "as open-and-shut as the court thinks."

Other than an occasional mention of criminal cases and a suggestion of cases involving ineffective counsel or misjoinder of offenses, lawyers seldom mentioned specific subject-matter areas in which oral argument might be eliminated. One attorney did, however, say that in technical cases with extensive briefing—such as environmental cases and others involving engineering and scientific issues—oral argument could also be eliminated. The attorneys instead focused on cases where "it is perfectly obvious how it would go" or where it was "clear one side was wrong on the law and it was clear from the briefs what would happen." Echoing the view of some judges as to the types of cases in which oral argument was least helpful, a public defender added that oral argument could be eliminated when the issues raised had been dispositively handled by the circuit. Oral argument could also be eliminated, several lawyers said, in "routine criminal cases with no complex fact setting or no novel legal issues," or the "more pedestrian types of appeals," where the facts were not complicated, the issues were restricted, and the briefs indicated agreement on the issues to be decided. Some at-

torneys believed that oral argument might be dispensed with if the briefs were well done, particularly if the attorneys also agreed on what the principal issue was, because "you'd just be rehashing" at oral argument.

The judges suggested many more types of cases in which oral argument could be eliminated, but showed recurring concern about the need to allow oral argument in criminal cases to maintain the appearance of justice. Thus, oral argument, although "utterly useless" in many criminal cases, was "very important to the public's perception of the court" and could be eliminated only at the cost of the "erosion of public confidence." Because of the "due process notion of giving the [defendant] the best service including oral argument"—"unfortunate" because many criminal cases were simple and non-controversial—"we march up the hill to give a simple measure of justice."

Despite such considerations, criminal cases were mentioned most frequently as the type in which argument could be eliminated. Were it not for the competing concerns just noted, they would eliminate oral argument in criminal cases because many criminal appeals were frivolous. As noted by a district judge who sat frequently with the appellate court, a defendant entitled to a free appeal was not likely to say "No, I don't want to burden the appeals court. I may find gold in those hills even though they've been prospected before." Some judges did differentiate between direct criminal appeals, where they were reluctant to eliminate argument, and habeas corpus cases, where they would do so, particularly if they involved *pro per* appearances. If the prisoner was incarcerated, oral argument was regularly denied. Limiting argument was the "only way to control" such situations because a defendant-appellant would take twenty minutes if given fifteen and if given thirty minutes would take forty-five; it was thus simpler to curtail argument completely.

At least some judges also found some civil cases candidates for "no oral argument," particularly if all members of a panel agreed that all problems were already presented in the briefs. The judges were willing to eliminate argument in simple civil cases, those which were "strictly factual," like a sufficiency of the evidence, single-issue case, or a case where the trial lasted one day but the jury instruction was criticized. Even if a case

contained more than one issue, oral argument might not be necessary if all the issues were simple. Oral argument could be eliminated as well, said some judges, "where the result appears to be obvious,"¹²⁷ or where there are recent applicable Ninth Circuit cases. Administrative agency cases were also mentioned. Oral argument was thought not particularly helpful in cases involving basically a limited review of the record to find a "basis in fact" or "substantial evidence." Because finding "abuse of discretion" was very difficult, cases involving agency discretion were thought not aided by argument. Two judges singled out appeals from Immigration and Naturalization Service cases taken to delay deportation.

C. EN BANC CASES

The Federal Judicial Center survey showed that only roughly one-fifth of the circuit judges were willing to dispense with oral argument in cases being heard en banc when the cases had already been argued to a three judge panel.¹²⁸ Only the Sixth Circuit lawyers were more willing than the judges to dispense with oral argument; only twenty percent of the Fifth Circuit attorneys and seventeen percent of those in the Second Circuit agreed.¹²⁹ The more experienced the lawyers were in arguing appellate cases, however, the more likely they were to perceive oral argument in these cases to be essential.¹³⁰

Two Ninth Circuit judges addressed the topic in their Hruska Commission testimony. Judge Shirley Hufstedler thought the importance of oral argument in en banc cases a function of "the reason you grant an en banc hearing." If the whole court was already agreed that a rule of law in the circuit

127. An example cited was the dismissal of a city as a party defendant in suits brought under 42 U.S.C. § 1983 (1970), at the time of the interviews a position both correct and clear. *Monroe v. Pape*, 365 U.S. 167 (1961), *rev'd*, *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). *See also*, *Owen v. City of Independence, Missouri*, 445 U.S. 622 (1980).

128. GOLDMAN, *supra* note 8, at 11 (Table VI). Some, but not many, cases are set for en banc hearing without a panel first hearing the case. The court sits en banc after a petition for rehearing en banc has been filed and a majority of the active-duty judges have voted so to hear the case. Despite appearances—resulting from the filing of the petition—almost all en banc hearings result not from the lawyer's request but from a call by a member of the court for a vote within the court.

129. DRURY, ET AL., *supra* note 8, at 24 (Table 16).

130. *Id.* at 24.

"has become so far eroded and so old that you ought to clear it off the books," en banc oral argument would accomplish little more than "require an extra trip for counsel."¹³¹ Although Circuit Judge Alfred Goodwin preferred to have oral argument in en banc cases, he took essentially the same position: the "unusual nature of those cases," which "do not slip up on the court unnoticed," means that argument is not "going to make an awfully lot of difference." In post argument conference, "everybody expressed pretty much the views he had been expressing for the two or three months that we had been building up to the oral argument."¹³²

All but one of the Ninth Circuit judges thought, in 1977, that oral argument should be heard by the en banc court when oral argument had not previously been heard by a panel of the court. The one judge who thought argument unnecessary in such situations believed such cases usually occurred where the court had come to the point "where the rule should be X rather than Y," that is, "in some obvious overruling of outdated precedent." Such matters were "non-controversial" and "can be taken care of ministerially." When oral argument had already been heard by a panel, four judges believed the en banc court need not hear further argument; a fifth said it was necessary in some cases but not in others. Argument was not necessary, the judges commented, because "intramural discussion," sometimes at meetings of the circuit's judicial council, would have already taken place, so that "going over it again won't help except [to allow] some of us to play to the gallery." There would have already been three or four cases on the subject by the time the court took a case en banc, and the judges would be familiar with the issues through the cumulative briefing they would have received. (A judge who generally favored en banc oral argument thought that when the en banc court was considering more than one case simultaneously, lawyers were "not entitled" to oral argument on the question common to the cases. He did, however, think there should be oral argument if the en banc court was concerned only with a single case which had been before the panel.)

131. FIRST PHASE, *supra* note 13, at 983-84 (If the briefs did not suggest a highly competent performance by counsel, "why should we assemble a whole panoply of judges to hear a rerun from a performance which is perhaps constitutionally competent but not much more?").

132. *Id.* at 821.

Oral argument was thought necessary by the judges even when the panel had heard argument because “if it’s important for thirteen judges [the en banc court], then it’s important enough to be heard” even if it had been thoroughly briefed. Judges who had not been members of the original panel—a “whole bunch of judges who are new to it”—had to be “familiarized” with the case. Moreover, because cases taken en banc for rehearing “tend to be cases with a good deal of difference of opinion,” and “complicated cases,” all the judges needed to be reinforced on the substance of the issue. Statements at conference by judges who had sat on the panel were not thought adequate substitutes for counsel arguing the case, and it was “desirable to avoid the idea that panel judges control” disposition through their presentation to their colleagues. “Sometimes,” however, “they take up all the time at argument by arguing with each other or by asking questions.” What is important is that the other judges hear directly from counsel in such situations.

Argument was also thought important because it provided an opportunity—perhaps the only available mechanism—to “get the judges to sit down on the same day to focus their argument,” after all the judges “do their homework on the case at the same time.” This joint meeting is thought more important than argument itself; it serves to get the adrenalin flowing so the judges could deal with the issue in the case.

D. ORAL ARGUMENT VS. WRITTEN OPINION

Reduction or elimination of oral argument is only one means proposed to reduce the work of appellate courts. Both judges and lawyers queried by the Federal Judicial Center were more willing to accept limitation of oral argument than to approve practices which limited written opinions. However, the judges, given a forced choice between oral argument and full written opinions, clearly preferred retaining oral argument and making greater use of memorandum opinions (brief opinions, often “Not for Publication”), or “reasoned oral disposition” in most categories of cases.¹³³ A majority of the judges agreed on

133. GOLDMAN, *supra* note 8, at 12. The exceptions are patent cases (full opinion preferred) and tax cases (oral argument preferred). Among the lawyers there was relatively little between-case-type variation. DRURY, ET AL., *supra* note 8, at 26 (Table 17). Hruska Commission witnesses stating a position on the issue of oral argument versus

the importance of issuing at least memoranda so the courts "do not give the appearance to litigants of acting arbitrarily,"¹³⁴ but only one-third of the circuit judges thought that "the absence of a reasoned disposition" would provide "no guidance . . . for district judges or the bar in future cases."¹³⁵ On the other hand, "nearly half the circuit judges agreed that in the absence of a reasoned disposition, members of the bar may infer that the court has acted arbitrarily, yet little more than a quarter of the district judges concurred."¹³⁶

In the Federal Judicial Center survey, fifty-six percent of the Second Circuit attorneys preferred oral argument and increased use of memorandum opinions or reasoned oral disposition to full opinion and limited or no oral argument (a preference consistent with Second Circuit practice) while Fifth and Sixth Circuit attorneys had the reverse preference (fifty-nine percent and fifty-four percent, respectively).¹³⁷ Ninth Circuit attorneys who made a choice in 1977 were closely divided in their preferences: seven would prefer oral argument, nine the written opinion.¹³⁸ One Ninth Circuit lawyer refused to answer, saying it was a "specious choice" and he would not be put to such a selection, while another who did answer called it an "insane" choice. Two other lawyers could not choose because both argument and opinions were important or because it depended on the type of case. (Oral argument might be preferable in a case involving only the private rights of parties *A* and *B*, but where a large issue, e.g., ERISA, was involved, a written opinion was better because others would need to know the court's answers.)

Among those preferring oral argument, one labor lawyer found "bad results without it," but written opinions were "needed for development of the law." However, another said the

written opinion generally took the side of oral argument. See *FIRST PHASE*, *supra* note 13, at 78 (testimony of Orison S. Marden), 106 (testimony of Carl MacGowan, J.), 776-77 & 785 (testimony of William H. Morrison), 308 (testimony of Joe D. Hall).

134. *GOLDMAN*, *supra* note 8, at 17 (Table IX).

135. *Id.* at 17.

136. *Id.* at 20 (Table XII).

137. *DRURY, ET AL.*, *supra* note 8, at 26 (Table 17).

138. The judges were not asked about their preference between oral argument and full written opinions. But see the earlier comments of Chief Judge Richard Chambers: "It is wrong to have no oral argument and a perfunctory disposition. It is better to have oral argument and a perfunctory disposition in the thin (but not silly) case than it is vice versa." Bright, *supra* note 22, at 505 n.8.

judges would in any event decide the case largely on the basis of the briefs. An attorney who preferred a written opinion emphasized the role of briefs in saying that if he sacrificed oral argument, he could brief more carefully and would be more likely to use reply briefs. The value of a written opinion, he thought, was the "proper check" it placed on "the court's superficiality and discretion," forcing the court to express its views in ways "credible to the bar." A written opinion also provided lawyers with the basis of the decision so that they could tell their clients.

Another aspect of the context of evaluating preferences for oral argument—and written opinions—is the matter of delay. A "large proportion" of the judges surveyed by the Federal Judicial Center believed that retaining both oral argument and written opinions was worth waiting longer than the current time to disposition,¹³⁹ although the judges were "more concerned about avoiding extreme delay" than were the attorneys.¹⁴⁰ Lawyers also wanted both oral argument and written opinions even if it meant that more time would be consumed by cases.¹⁴¹ Indeed, "the speed with which opinions are rendered is a matter of relatively low priority" for the lawyers, with few believing that eliminating oral argument or limiting opinions is "the most acceptable way to avoid long delays in the court's calendar when the docket becomes crowded."¹⁴² In no category of cases were more than twenty percent of the attorneys willing to give up both oral argument and written opinions in order to reduce the time to disposition. The converse of this is that roughly seventy-five to eighty percent of the attorneys were willing to wait longer than the current amount of time (as they perceived it) to obtain the traditional practices.¹⁴³

139. GOLDMAN, *supra* note 8, at 14. Nor was there much variation between categories of cases.

140. *Id.* at 7.

141. *Id.* at 15.

142. DRURY, ET AL., *supra* note 13, at 32 & 34.

143. *Id.* at 33 (Table 22), 34 (Table 24). Table 25, *id.* at 35-36, indicates the median number of months the attorneys perceive is required to obtain a final disposition and the median number of months they are willing to wait to have both oral argument and written opinion. For example, in patent cases, the perceived present times were 3.9, 7.4, and 4.6 months for the Second, Fifth and Sixth Circuits, respectively, and the attorneys were willing to wait, respectively, 9.2, 12.0, and 9.9 months.

V. JUDGES' PREPARATION FOR ARGUMENT

The standard announcement of Ninth Circuit panels to attorneys appearing before them is that all the judges have read the briefs. Although the reading of briefs before argument is now standard practice in many American courts, "[e]arlier in this century often only one judge, the opinion writer, read the briefs; and the judges who did read the briefs did so after the oral arguments."¹⁴⁴ Indeed, there are still some judges who believe that briefs should be read after the close of argument. One Ninth Circuit district judge, for example, believed that the effect of appellate oral argument was reduced because judges had a "preconceived opinion" from having read the briefs. In a trial, he observed, there is no preconceived idea and argument thus has more effect.¹⁴⁵

If all the judges do read the briefs in advance of argument, what else do they do to prepare for argument, so that it will be most effective for them?¹⁴⁶ All the judges responding looked at materials beyond the briefs and all indicated that materials examined affected their participation in argument by serving to focus their attention and by helping them prepare questions to ask the attorneys.

Marvell pointed out that in the First and Sixth Circuits the judges "read, or at least skim, the appendixes," in addition to reading the briefs. Beyond that, some judges or their clerks "may even look at the actual record in the clerk's office[, and a] great many circuit judges have their clerks write 'bench memos'."¹⁴⁷ In the Ninth Circuit, slightly more than half the circuit judges and most of the district judges looked at the record, the transcript, or parts of one or the other. Others had their clerks do so. Five of the fifteen circuit judges read the opinion or

144. MARVELL, *supra* note 20, at 72.

145. Marvell noted that among the "main reasons" for not reading briefs before argument is "that judges should go into the arguments without any knowledge about the case so that they will listen to the attorneys with an open mind." *Id.* (citing F. WIENER, *EFFECTIVE APPELLATE ADVOCACY* 12-20 (1950); Hopkins, *The Winds of Change: New Styles in the Appellate Process*, 3 *HOFSTRA L. REV.* 649, 655-56 (1975); Vanderbilt, *Improving the Administration of Justice—Two Decades of Development*, 26 *U. CIN. L. REV.* 155, 266-67 (1957)).

146. For a discussion of this topic aimed at judges, see Goldberg, *Preparation for Hearing Oral Argument*, 63 *F.R.D.* 499 (1974).

147. MARVELL, *supra* note 20, at 73.

memorandum of the court below, but others may have included it in saying they examined the record. Only a few judges looked at exhibits. (One circuit judge noted they had to be sent for.) Other varied materials examined included tax memoranda and the Restatements. Several circuit judges and half the district judges also looked at cases cited in the briefs, and several judges also turned to law review articles. Judges were particularly likely to look for cases not cited in the briefs in important or complicated cases, or cases of first impression, or when a rule of law overlooked by counsel occurred to the judge. One judge specifically looked at cases from other circuits which bore on the points raised in the briefs.

Those who looked at the record did not do so in every case. Some did so when they believed they could not otherwise understand the case adequately or if they had doubts about whether the record supported contentions made in the briefs. As one judge put it, he did not want to depend on counsel's interpretation of the record—"the record has it." Others looked at the record on the basis of particular cues (if a "red flag goes up" when he was reading the briefs) or if a clerk pointed out parts of it. The record was usually read selectively, "because it is mostly junk." Some district judges were more inclined than their appellate colleagues to delve more heavily into the record, perhaps a reflection of their different approach to appellate review,¹⁴⁸ but also a result of their recognition that appellate judges might not have the time to do so. Several indicated they had read the entire record, despite the difficulty involved; one read the entire reporter's transcript to become more confident about his grasp of the case as well as to obtain pleasure at oral argument in correcting trial counsel who hadn't read the transcript as recently.

Most, but not all, judges (eleven of fourteen circuit judges, eight of nine district judges) had their law clerks prepare memoranda in advance of argument.¹⁴⁹ Workload considerations precluded this practice—or its full use—for some judges: "Workload means they have to work on other things." Workload

148. See Wasby, "Extra Judges in 'The Court Nobody Knows'," *supra* note 15, at 19-20.

149. On the use of law clerks, see Wright, *Observations of an Appellate Judge: The Use of Law Clerks*, 26 VAND. L. REV. 1179, particularly at 1183 (1973). See generally MARVELL, *supra* note 20, at 87-97.

considerations also had led to clerk-sharing, in which preparation of bench memoranda for a panel was divided among the clerks of the panel's three judges. Circulation of that memorandum allowed the other two judges and their clerks to spot deficiencies. At times, a judge receiving a memo "may circulate a written response in advance of oral argument, offering a contrary view and supplemental citations," a "very profitable" exchange which "does *not* commit any judge to a decision before oral argument" except when it reveals the lack of jurisdiction, mootness, or a clearly governing circuit precedent.¹⁵⁰ The minority view was that memoranda should not be circulated in advance of argument because that committed judges to a position prematurely.

Several judges did not have their clerks prepare memoranda in all cases, in part for workload reasons and in part because "it would be a waste of time in some cases." Some judges reserved their clerks' time for civil case memoranda, taking the criminal cases themselves and telling the clerks what should be done with them. One senior circuit judge who reserved criminal cases for himself said that on matters like search and seizure, probable cause, and border search cases regularly before the court, he could do three a day himself. In other instances, for example, sufficiency of the evidence cases, he said a clerk right out of law school could not make a good, quick judgment and would wrestle with such cases for days.

District judges were particularly concerned about preparation of memoranda by their clerks. One had directed his clerk to prepare a memorandum when he first sat with the court of appeals out of a "feeling of necessity to be as well prepared as possible" but he had stopped doing it as his district court workload increased. Nonetheless, he and his clerks examined the briefs when they arrived and discussed them in the week before argument, so he could avoid "justice by crisis" immediately before argument. Other district judges who did not have their clerks prepare memos had other reasons. One considered oral argu-

150. Personal communication from a Ninth Circuit judge to the author. For a discussion of communication through bench memoranda, see Wasby, *Communication Within the Ninth Circuit Court of Appeals*, *supra* note 15, at 4, and, on communication between judges through law clerks and between law clerks independently, see *id.* at 11-14.

ment less persuasive for judges who had done their primary work before argument; a judge without a bench memo was there to develop fine points. Another simply wished to avoid duplication with either a staff attorney memorandum (if he agreed with it) or a memorandum circulated by a circuit judge.

What were the clerks' memoranda to include? Only two judges (one circuit judge and one district judge) had their clerks include questions to ask attorneys, but others said they could easily develop such questions from the memos. Most frequently included were the facts or a summary of the facts and the basic issues or contentions of the parties, relevant cases, and proposed dispositions. Several circuit judges and one district judge particularly stressed discussions of jurisdiction, because "we have to raise it even if the parties don't."

Most judges wanted only a summary of the facts, although a few wanted an analysis of the facts with references to relevant law or identification of areas of the record needing clarification. All the judges wished clerks' memoranda to include material on the issues, whether specifically identified or available through an outline or "distillation" of the briefs. Several judges wanted their clerks to examine whether the cases cited "say what they are purported to." More was involved, however, than checking cases cited; judges had their clerks look for other cases because lawyers might not even mention some which were relevant and might omit new cases, particularly in civil appeals where a long time had elapsed from filing of the appeal to oral argument.

Several judges wanted their clerks' view of the issues presented, an appraisal of the parties' contentions, a critique of the opposing briefs, or a comparative analysis of the parties' positions. Some judges went further, asking for clerks' tentative conclusions about the case or a proposed disposition—which, for at least some judges, could be used as the basis for the court's opinion. One circuit judge saw the process as a learning experience. He had the clerk recommend a decision because clerks were going to have to make decisions as lawyers, and he also learned from their positions, as did a colleague who said the clerks often found new points of view because they were not as "involved" in the case.

All but one of the circuit judges and one of the district judges prepared material to supplement what the clerks had done. They did not do so in every case, however. At times, they prepared memos (albeit brief) when they disagreed with clerks' conclusions. At other times, they prepared memos when the clerks did not. In a few instances, even when the clerk had prepared a memo, the judge might "start all over again."

By and large, judges made notes rather than prepared more formal documents, although some did prepare "outlines" or short memoranda. "Notes in the margin" of the clerks' material was frequently mentioned; the judges "scribbled on foolscap" and wrote notes on a pad or in a looseleaf notebook they would have with them during argument. Others wrote "one-word reminders all over the memoranda and briefs" to refresh their memories for asking questions. Although a couple of judges prepared questions for argument only "seldom," most judges frequently wrote down questions they might want to ask at oral argument. They would not necessarily ask those questions, but the questions denoted issues they wanted covered, either by counsel or in a question from another member of the panel.

VI. CONCLUDING COMMENTS

While trial advocacy has received considerable attention in recent years, appellate oral advocacy also deserves attention, even though far fewer lawyers participate in it regularly. Efforts by appellate courts at both federal and state levels to "streamline" their proceedings in order to deal with mounting caseloads require an understanding of the functions both judges and lawyers expect appellate oral argument to perform, and of the ways in which both find oral argument helpful and not helpful. It is important that lawyers have a better grasp of judges' feelings on the subject and on such particulars as the types of cases in which reduced oral argument is considered appropriate or the case-types in which the court believes it can dispense with argument. Similarly, it is important that judges understand lawyers' concerns about limitations on, or elimination of, oral argument.

Through the presentation of information drawn from a multi-circuit survey of judges and lawyers conducted by the Federal Judicial Center, from testimony before the Hruska Commission, from a variety of other sources, and, most particu-

larly, from intensive interviews of circuit and district judges and lawyers in the U.S. Court of Appeals for the Ninth Circuit, this Article has presented a thorough sampling of those views. That the range of opinions about oral argument is wide should be clear from this recitation, as should the feeling that appellate oral argument is expected to serve a multiplicity of functions for both judges and attorneys, with the emphasis differing somewhat from one group to the other. Beneath all the views runs a recurrent theme. That there is a tension between maintaining a practice which is not only an "amenity" but also is believed to have considerable importance for both appellate judges and the attorneys who practice before them, and the need to adjust to the "real life" situation in which appellate judges find themselves. This situation characterized by increased caseloads, not only in a court of many judges like the Ninth Circuit but elsewhere in the appellate bench across the nation, and by recognition that cases can be differentiated one from another. The tension shows no signs of abating. More importantly, neither element creating the tension has won over the other, despite the inroads which some believe have occurred in a traditional, established practice. Adjustments have been made but appellate oral argument is in no danger of being extinguished. To the extent the participants in appellate advocacy understand the matters portrayed in these pages, appellate oral argument will remain a significant part of appellate practice even if characterized by this continuing tension.